SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 126

PIGEON RIVER IMPROVEMENT, SLIDE & BOOM COMPANY, APPELLANT,

vs.

CHARLES W. COX, LIMITED

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1933

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1 United States District Court, District of Minnesota, Fifth Division.

Pigeon River Improvement, Slide & Boom Company, Plaintiff.

vs.

Charles W. Cox, Limited, Defendant.

Appearances:

Jenswold, Jenswold & Dahle, Duluth, Minnesota, Attorney for Plaintiff.

Fryberger, Fulton & Boyle, Duluth, Minnesota, Attorneys for Defendant.

Pleas Before the Honorable the Judges of the United States District Court, District of Minnesota.

Be It Remembered That on the 5th day of September, A. D., 1930, there was filed in the office of the Clerk of the above named court, petition and order for Removal from the District Court of the County of Cook, Minnesota, which are in words and figures following, to-wit:

2 Petition for Removal to United States District Court.

District Court
Eleventh Judicial District

State of Minnesota,
County of Cook.

Pigeon River Improvement, Slide and Boom Company, Plaintiff,

vs.

Charles W. Cox, Limited, Defendant.

To the Honorable: The Judges of the District Court of Cook County, Minnesota:

Your petitioner, Charles W. Cox, Limited, the defendant in the above entitled action, respectfully alleges and shows to the Court:

First: That said action was commenced by the plaintiff against the defendant in the District Court of Cook County, Minnesota, by an alleged attachment in Pigeon River of certain forest products belonging to said defendant and by service of the summons upon said defendant in the Providence of Ontario, Canada, on August 11th, 1932.

Second: That in its complaint in said action, plaintiff seeks to recover from said defendant the sum of $8,199.36, as tolls for the alleged use of certain improvements in said Pigeon River in the driving, sluicing and floating of pulpwood down said Pigeon River during the years 1928, 1929 and 1930.

Third: That said defendant denies liability to plaintiff on account of the matters and things set forth in plaintiff's said complaint and a controversy exists which is wholly of a civil nature and exceeds the sum of $3,999.00 exclusive of interest and costs.

3 Fourth: That the plaintiff in said action is now and was at the time of the commencement of said action a corporation organized and existing under and by virtue of the laws of the State of Minnesota and that said plaintiff is a citizen and resident of said State of Minnesota.

Fifth: That the defendant is now and at all times mentioned herein has been a corporation duly organized and existing under and by virtue of the laws of the Providence of Ontario, Canada, and now is and was at the time of the commencement of this action and at the time of the accrual of the alleged cause of action herein a citizen and resident of the Province of Ontario in the Dominion of Canada.

Sixth: That the matter in controversy between plaintiff and defendant herein arises under the constitution and laws of the United States of America and the so-called Webster-Ashburton Treaty entered into between the United States of America and Great Britain in the year 1842, establishing the international boundary between the United States and Canada and providing, among other things, that said Pigeon River shall be free and open to the use of the citizens and subjects of both said countries; that your petitioner is informed and believes that plaintiff has no authority to collect tolls for the use of improvements on said river from the United States of America or Great Britain or the Dominion of Canada, or at all, excepting such authority as may be granted by the laws of the State of Minnesota, under which said plaintiff is organized, to-wit: Title 1 Chapter 34, General Statutes of Minnesota for the year 1894; that the plaintiff claims that it has a

right to collect tolls on Pigeon River under the authority granted to it under said laws of the State of Minnesota and the defendant denies that plaintiff has any such right and claims that it would be a violation of the provisions of said Webster-Ashburton Treaty to exact tolls in the manner aforesaid.

4 Seventh: That the time which is allowed to the defendant by the laws of the State of Minnesota and the rules of the above named Court to answer or otherwise plead to the complaint in said action has not expired and will not expire until September 2nd, 1930.

Eighth: That your petitioner makes and files herewith an undertaking as provided by statute conditioned that it will, within thirty days, file in the United States District Court for the District of Minnesota, Fifth Division, a transcript of the record in said action and for the payment of all costs which may be awarded if said court shall hold that said action was wrongfully or improperly removed thereto.

Wherefore your petitioner prays that this court proceed no further herein, except to make an order as required by law, removing said cause to the District Court of the United States for the District of Minnesota, Fifth Division, and to accept and approve the undertaking presented herewith and to direct a transcript of the record herein to be made for said District Court of the United States as provided by law.

CHARLES W. COX, LIMITED,
By Charles W. Cox, President.

FRYBERGER, FULTON & BOYLE,
Attorneys for Defendant, 712-719 Lonsdale Building, Duluth, Minnesota.

State of Minnesota,
County of St. Louis—ss.

Charles W. Cox, being duly sworn says that he is the president of Charles W. Cox, Limited, the defendant in the above entitled action; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

CHARLES W. COX.

Subscribed and sworn to before me this 29th day of August, 1932.

(Notarial Seal) E. L. BOYLE,
Notary Public, St. Louis County, Minn.

My Commission expires Aug. 10, 1937.

5 (Order of Removal.)

District Court
Eleventh Judicial District.

State of Minnesota,
County of Cook.

Pigeon River Improvement, Slide and Boom Company, Plaintiff.

vs.

Charles W. Cox, Limited, Defendant.

On August 29th, 1932, the above entitled action came on for hearing before the above named court, upon the petition of the defendant for removal of said action to the District Court of the United States for the District of Minnesota, Fifth Division, and the court having inspected the records and files herein and having heard the statements of counsel and being fully advised in the premises, finds:

That said action is of a civil nature and involves an amount exceeding the sum of $3,000.00, exclusive of interest and costs, and is of a nature of which the District Court of the United States had jurisdiction.

That plaintiff therein is a citizen and resident of the State of Minnesota and the defendant is a citizen and resident of the Providence of Ontario, Canada, and that matter in controversy arises under the constitution and laws of the United States and treaties made under their authority.

That the defendant's petition for removal was presented before the expiration of the time allowed by the laws of the State of Minnesota and the rules of this court for the defendant to appear and answer or otherwise plead herein.

6 That the petition and undertaking, attached hereto and filed herewith, are in due form; that said undertaking is sufficient in amount; that the surety thereon is good for the amount thereof and that written notice of such petition and undertaking has been given to adverse party prior to the filing of the same.

It Is Therefore Ordered That said undertaking be and the same hereby is accepted and approved; that the petition for removal be and the same is hereby granted, and the court proceed no further in this cause but that the same stand removed to the District Court of the United States for the District of Minnesota, Fifth Division, and that the clerk of this court be and said clerk is directed, upon payment of legal fees therefor, to make and certify to the clerk of said United

States District Court, a transcript of the records and proceedings herein.

By the Court:

BERT FESLER,
Judge.

August 29th, 1930.

Endorsed filed in my office this 30th day of August, 1930, Matt Johnson, Clerk of District Court, Cook County, Minn.

Endorsed: Filed September 5. 1930, Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

(Recital as to Bond on Removal.)

That on the same day, to-wit: September 5, 1930, there was filed in the office, and accompanying the above petition and order, a due and proper undertaking in the sum of Five hundred dollars ($500.00), with Maryland Casualty Company, a corporation organized under the laws of the State of Maryland, and authorized to [take] execute bonds and undertakings in the State of Minnesota, as surety, duly approved by the court.

---

7 That thereafter and on the 4th day of May, A. D. 1932, there was filed Amended complaint in said cause, which is in words and figures following:

8 Amended Complaint.

District Court of the United States, District of Minnesota, Fifth Division.

(Removed From District Court, Eleventh Judicial District, Cook County, Minnesota.)

Pigeon River Improvement, Slide & Boom Company, Plaintiff,

vs.

Charles W. Cox, Limited, Defendant.

Plaintiff, for its amended complaint herein, alleges:

I.

As a first cause of action herein:

1) That plaintiff is and ever since September 3, 1898 it has been a corporation, thereunto duly organized, created and existing under and by virtue of the laws of the State of Minnesota, including Title I of Chapter 34, General Statutes of Minnesota for the year 1894, and particularly Chapter 221, General Laws of Minnesota for the year 1889, and acts amendatory thereof and supplemental thereto, and as such was at all times and is empowered to construct, maintain,

operate and manage dams, sluices, flumes, slides, locks, reservoirs, bulkheads, booms and other structures useful or expedient in properly improving, developing and using the water supply for the purpose of handling, floating or navigating logs, ties, poles, posts, timber and wood of every description upon, over and in that part of the stream commonly known as Pigeon River, bordering or lying within the boundaries of Cook County, Minnesota, and its tributaries, as well as clearing, straightening and improving the channel of said stream, and to charge, receive and collect tolls and compensation for the use of said improvements and property in running, driving and handling said timber products, and to contract with other companies for the improvement, maintenance, operation and use of such other improvements upon Pigeon River and its tributaries in Canada, as may be expedient, and to do all acts and transact all business authorized by law connected with or incidental to the construction, ownership, maintenance and operation of an improvement, slide and boom company, and the properties connected therewith.

2) That defendant is and at all the times herein stated it was a corporation thereunto duly organized, created and existing under and by virtue of a Charter from and the laws of the Province of Ontario and the Dominion of Canada.

3) That said Pigeon River has its source and headwaters in North Fowl, South Fowl and Royal Lakes in said Cook County, and flows along the international boundary between the United States and Canada a distance of upwards of 40 miles to Pigeon Bay upon Lake Superior, and at all times has had and now has tributary thereto a considerable growth and supply of merchantable timber, both within said Cook County and the Province of Ontario. That the international boundary between the United States and Canada traverses said river and said North Fowl and South Fowl Lakes, and lies approximately midway between ~~the banks~~ thereof. That said river prior to plaintiff's improvement thereof, as hereinafter alleged, was at all times incapable of use for the driving, handling and floating of logs, pulpwood and timber of other sorts thereon.

4) That at the time of plaintiff's incorporation no other corporation had been organized for the improvement of the portion of Pigeon River within the State of Minnesota for the floating, driving and handling of logs thereon, nor had any company so organized, taken prior possession of said river and made improvements of such character thereon. That upon plaintiff's incorporation, it took prior possession of the portion of said Pigeon River within

the State of Minnesota and improved said river by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms, [side], rolling, sluicing and flooding dams upon the American side of the international boundary therein, and at the same time Arrow River and Tributaries Boom & Slide Company, a corporation thereunto duly organized, created and existing under and pursuant to charter and laws of the Dominion of Canada and Province of Ontario, for purposes and with powers similar to the purposes of organization and powers of plaintiff, but limited to the portion of Pigeon River and its tributaries within the Dominion of Canada, pursuant to agreement with plaintiff, similarly improved the portion of said Pigeon River within the Dominion of Canada, so that the improvements so made and constructed by each company constituted complements the one of the other, and the whole of said improvements rendered the driving of logs thereon reasonably practicable and certain, and said improvements have at all times thereafter been kept and maintained in and upon said river, and plaintiff has at all times since, including the year 1930, kept its said improvements in repair and has so operated its works thereon as to render the driving of logs upon said Pigeon River reasonably practicable and certain, and intends and expects so to continue.

5) That a true and correct map and survey of said Pigeon River and of the land on either side immediately adjacent thereto, prepared by the International Boundary Commission, consisting of nine sheets marked Exhibits A to I, inclusive, and on file herein, is by reference thereto made a part hereof as fully as though herein pleaded by exhibit. That Fort Charlotte which was at all times the northerly terminus of Grand Portage Trail, which [trial] extended from Grand Portage overland to said Fort Charlotte, which Fort Charlotte was the only point on said river reached and
11 touched by said [trial], was located at a point on said river above Partridge Falls, which point is indicated on said Exhibit E by the words "Fort Charlotte" designating the same. That all of plaintiff's and of said Arrow Company's said improvements to said river were located at all times below said Fort Charlotte, with the sole exception of a reservoir dam at the south end of South Fowl Lake. That a number of plaintiff's said structures and improvements are indicated upon said map, including said dam at South Fowl Lake.

5) That in the Spring of the year 1928 defendant was the owner of about 5320 single cords of pulpwood and about 63 railway ties, which it put into said Pigeon River at the point

where Arrow River empties therein, all of which it then drove, sluiced and floated from said point down and upon said Pigeon River to its mouth at said Pigeon Bay, and in so doing made use of the aforesaid improvements to said river constructed and maintained by plaintiff as aforesaid.

6) That the reasonable and uniform tolls therefor duly established and fixed by plaintiff for the use of plaintiff's said improvements to said river in so driving, sluicing and floating said pulpwood and ties is the sum of and at the rate of 30 cents per single cord of pulpwood and 3 cents per railway tie, which sums are respectively the reasonable values of such use of said improvements, and by reason thereof there became and is due to plaintiff therefor the sum of $1597.89, no part of which has been paid, although demand has been made therefor.

II.

As a second cause of action herein:

1) Plaintiff re-alleges the matter set forth in paragraphs numbered 1, 2, 3, 4 and 5 of its first cause of action herein as fully as though herein separately set forth and alleged.

2) That in the Spring of the year 1929 defendant was the owner of about 1852 single cords of pulpwood and about 53,765 railway ties, which it put into said Pigeon River at the point where Arrow River empties therein, all of which it then drove, sluiced, and floated from said point down and upon said Pigeon River to its mouth at said Pigeon Bay, and in so doing made use of the aforesaid improvements to said river constructed and maintained by plaintiff as aforesaid.

3) That the reasonable and uniform tolls therefor duly established and fixed by plaintiff for the use of plaintiff's said improvements to said river in so driving, sluicing and floating said pulpwood and ties is the sum of and at the rate of 30 cents per single cord of pulpwood and 3 cents per railway tie, which sums are respectively the reasonable values of such use of said improvements, and by reason thereof there became and is due to plaintiff therefor the sum of $2168.55, no part of which has been paid, although demand has been made therefor.

III.

As a third cause of action herein:

1) Plaintiff re-alleges the matter set forth in paragraphs 1, 2, 3, 4 and 5 of its first cause of action herein as fully as though herein separately set forth and alleged.

2) That in the Spring of the year 1930 defendant was the owner of about 8,000 single cords of pulpwood and about 80,000 railway ties, which it put into said Pigeon River at the

point where Arrow River empties therein, all of which it then drove, sluiced and floated from said point down and upon said Pigeon River to its mouth at said Pigeon Bay, and in so doing made use of the aforesaid improvements to said river constructed and maintained by plaintiff as aforesaid.

3) That the reasonable and uniform tolls therefor duly established and fixed by plaintiff for the use of plaintiff's said improvements to said river in so driving, sluicing and floating said pulpwood and ties is the sum of and at the rate of
13 30 cents per single cord of pulpwood and 3 cents per railway tie, which sums are respectively the reasonable values of such use of said improvements, and by reason thereof there became and is due to plaintiff therefor the sum of $4,800, no part of which has been paid, although demand has been made therefor.

Wherefore, plaintiff demands judgment against the defendant for the sum of $8,566.44, together with its costs and disbursements herein.

JENSWOLD, JENSWOLD & DAHLE,
Attorneys for Plaintiff,
Suite 703 Palladio Bldg., Duluth, Minn.

State of Minnesota,
County of St. Louis—ss.

John D. Jenswold, being first duly sworn upon oath, says that he is the Secretary of Pigeon River Improvement, Slide & Boom Company, the plaintiff in the foregoing within entitled action; that he has heard read the foregoing amended complaint; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true to the best of his knowledge, information and belief.

JOHN D. JENSWOLD.

Subscribed and sworn to before me this 3rd day of May, 1932.

(Notarial Seal) C. A. DAHLE,
Notary Public, St. Louis County, Minn.

My Commission Expires Oct. 6, 1934.

Due and personal service of the within amended complaint is hereby admitted by receipt of copy thereof at Duluth, Minn., this 4 day of May, 1932.

FRYBERGER, FULTON & BOYLE,
Attorneys for Defendant.

Endorsed: Filed May 4, 1932, Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

13a

No. 2708

United States of America

Department of State

To all to whom these presents shall come,—Greeting:

I Certify That the document hereunto annexed is under the Seal of the International Boundary Commission, United States, Alaska, and Canada, and that James H. Van Wagenen, whose name is subscribed thereunto, is the Commissioner for the United States.

In Testimony Whereof, I, William R. Castle, Jr. Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this thirteenth day of May, 1932.

Seal
Department of State
United States of
America

WILLIAM R. CASTLE, JR.
Acting Secretary of State.
By (Signature illegible), Chief Clerk.

13b

International Boundary Commission

United States, Alaska, and Canada

United States Section

Address all Communications to
International Boundary Commission
United States, Alaska, and Canada
Washington, D. C.

James H. Van Wagenen, United States Commissioner
Noel J. Ogilvie, Canadian Commissioner

Washington, May 13, 1932

I hereby certify that the attached map is a true copy of Sheet No. 36 of the set of thirty-six maps of the International Boundary Line from the Northwesternmost Point of Lake of the Woods to Lake Superior, as reestablished by the Commissioners in accordance with the provisions of Article V of the Treaty between Great Britain and the United States of America, signed at Washington April 11, 1908.

JAMES H. VAN WAGENEN,
United States Commissioner.

Seal
International Boundary Commission
~~United States Section~~
United States-Alaska-Canada

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

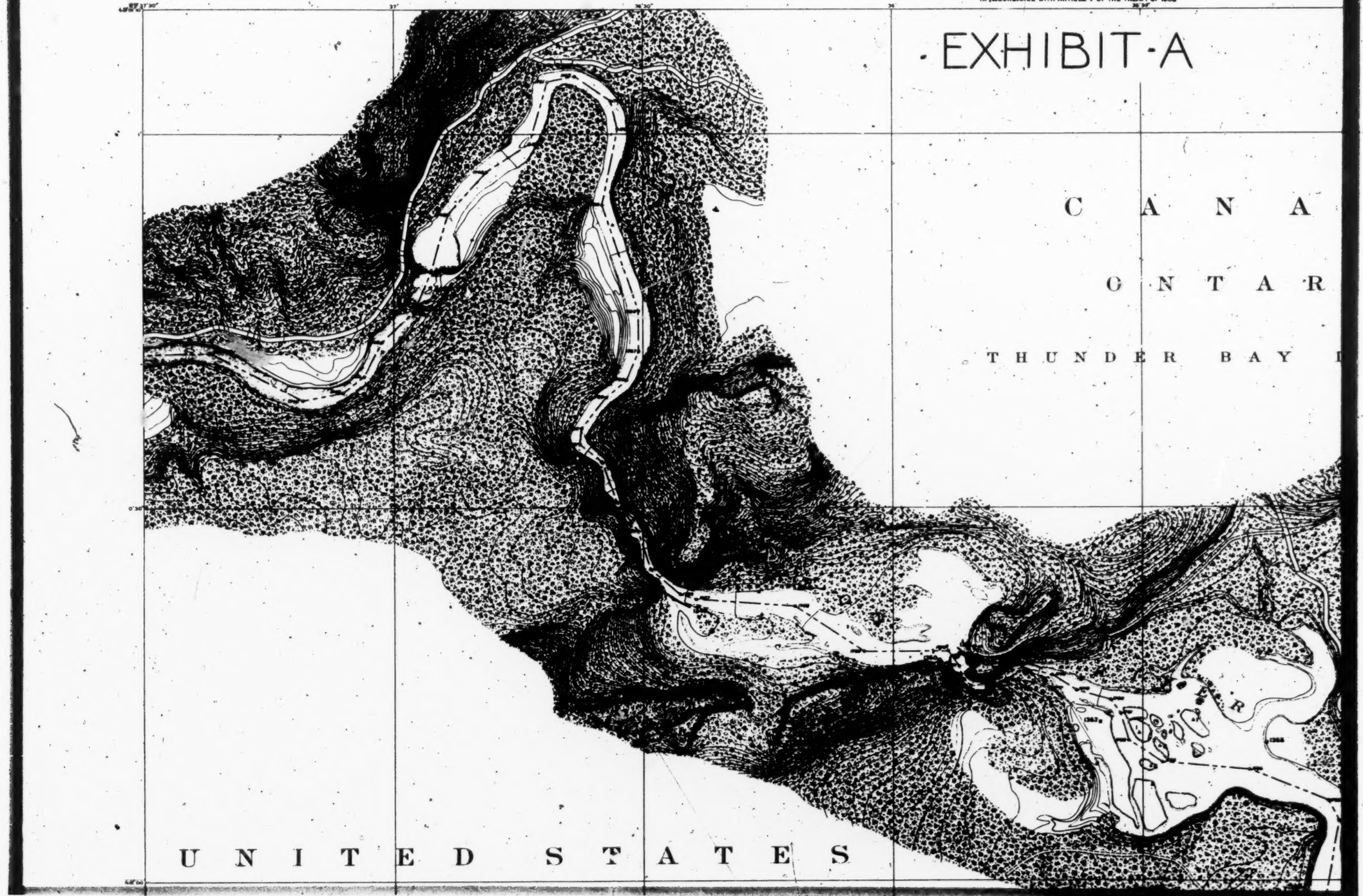
SHEET No. 36

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
O.H. TITTMANN, 1908-1915	W.F. KING, 1908-1918
E.C. BARNARD, 1915-1921	J.J. MacARTHUR, 1917-1924
E. LESTER JONES, 1921-1929	J.O. CRAIG, 1925-
JAMES H. VAN WAGENEN, 1929-	

IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

EXHIBIT-A



INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

SHEET No. 36

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
O.H. TITTMANN, 1908-1915	W.F. KING, 1908-1916
E.C. BARNARD, 1915-1921	J.J. McARTHUR, 1917-1924
E. LESTER JONES, 1921-1929	J.D. CRAIG, 1925-
JAMES H. VAN WAGENEN, 1929-	

IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

EXHIBIT-A

C A N A D A

O N T A R I O

T H U N D E R B A Y D I S T R I C T

L A K E S U P E R I O R

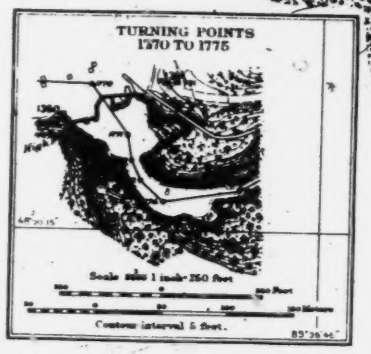
P I G E O N B A Y

E S

U N I T E D S T A T E S

M I N N E S O T A

C O O K C O U N T Y



Scale 1 inch = 500 feet

Contour interval 5 feet.

FOR THE UNITED STATES

JESSE HILL, ENGINEER TO THE COMMISSION

SURVEYORS IN CHARGE: W. B. FAIRFIELD, 1908 AND 1909, JOHN J. PHELAN, 1917, AND JESSE HILL, 1918
CONTROL BY W. B. FAIRFIELD, 1908, JESSE HILL AND E. R. MARTIN, 1918
TOPOGRAPHY BY RUDOLPH LEUCHER, 1909, J. J. CHANTERS, CHARLES E. CARR, L. DUNDLER, AND P. H. DUNDLER, 1917, AND R. K. LYNT, 1917 AND 1918
MONUMENTING BY E. R. MARTIN, 1918

MATHEMATICIAN, R. H. ASHMUN
CARTOGRAPHER, EDWARD RAUSCH

FOR HIS MAJESTY

J. A. POUNDER, D. L. S., ENGINEER TO THE COMMISSION

INSPECTION BY J. J. MCARTHUR, D. L. S., 1918

Enlarged Areas

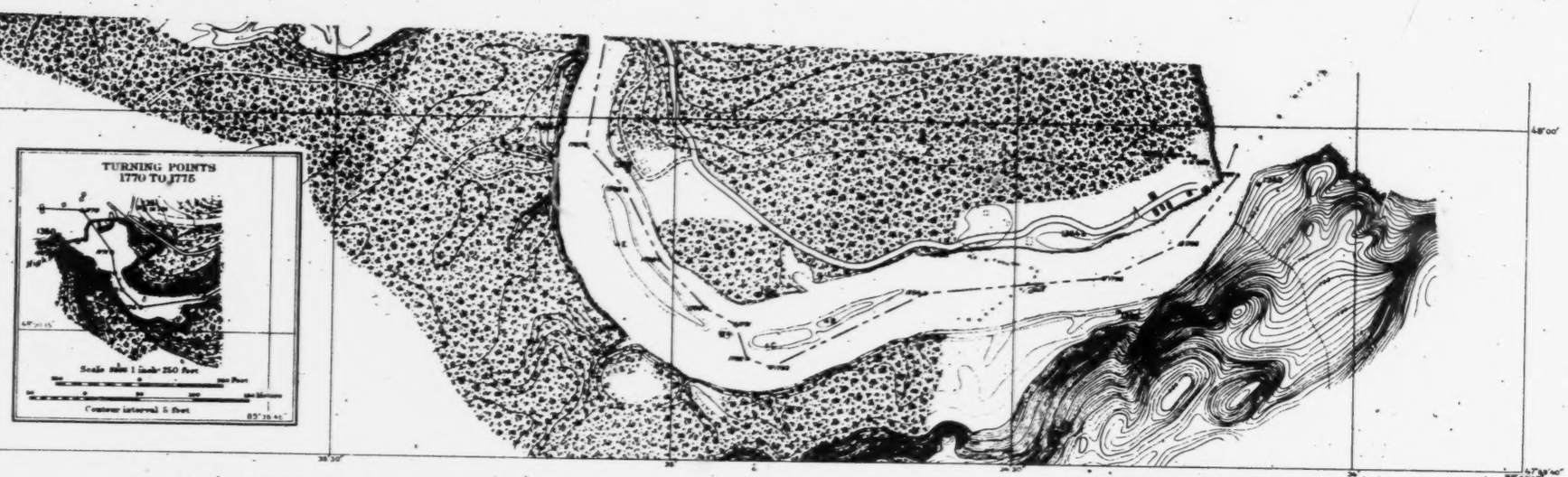
Providence *Evergreen*

International Boundary Line
Boundary Reference Marks (bronze posts, 6 in high) ●
Boundary Turning Points (not marked)

Reference Marks D67 AD40 AD49 A and those marked AB C D E F, 6 A E and I are bronze disks 3 inches in diameter.

Date of publication 1910

E S



Scale 1 inch = 500 feet

Contour interval 5 feet

Timbered Areas

Deciduous Evergreen

International Boundary Line

Boundary Reference Marks (Bronze posts 9 in high) a

Boundary Turning Points (not marked)

We certify that this map is one of the quadruplicate set of thirty-six (36) maps prepared under Article V of the Treaty between Great Britain and the United States of America, signed at Washington, April 11, 1908, and that we have marked hereon the Boundary Line as reestablished by the Commissioners designated above, in accordance with the provisions of the said Treaty.

Signed February 27, 1920

His Britannic Majesty's Commissioner

United States Commissioner

SHEET NO. 36

No. 2706

United States of America

Department of State

To all to whom these presents shall come,—Greeting:

I Certify That the document hereunto annexed is under the Seal of the International Boundary Commission, United States, Alaska, and Canada, and that James H. Van Wagenen, whose name is subscribed thereunto, is the Commissioner for the United States.

In Testimony Whereof, I, William R. Castle, Jr. Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this thirteenth day of May, 1932.

Seal
Department of State
United States of
America

WILLIAM R. CASTLE, JR.
Acting Secretary of State.
By (Signature illegible), Chief Clerk.

International Boundary Commission

United States, Alaska, and Canada

United States Section

Address all Communications to
International Boundary Commission
United States, Alaska, and Canada
Washington, D. C.

James H. Van Wagenen, United States Commissioner
Noel J. Ogilvie, Canadian Commissioner

Washington, May 13, 1932

I hereby certify that the attached map is a true copy of Sheet No. 35 of the set of thirty-six maps of the International Boundary Line from the Northwesternmost Point of Lake of the Woods to Lake Superior, as reestablished by the Commissioners in accordance with the provisions of Article V of the Treaty between Great Britain and the United States of America, signed at Washington April 11, 1908.

JAMES H. VAN WAGENEN,
United States Commissioner.

Seal
International Boundary Commission
United States Section
United States-Alaska-Canada

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

SHEET No. 35

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
O.H. TITTMANN, 1908-1915	W.F. KING, 1908-1915
E.C. BARNARD, 1915-1931	J.J. McARTHUR, 1917-1924
F. LESTER JONES, 1921-1929	J.D. CRAIG, 1925-
JAMES H. VAN WAGENEN, 1929-	

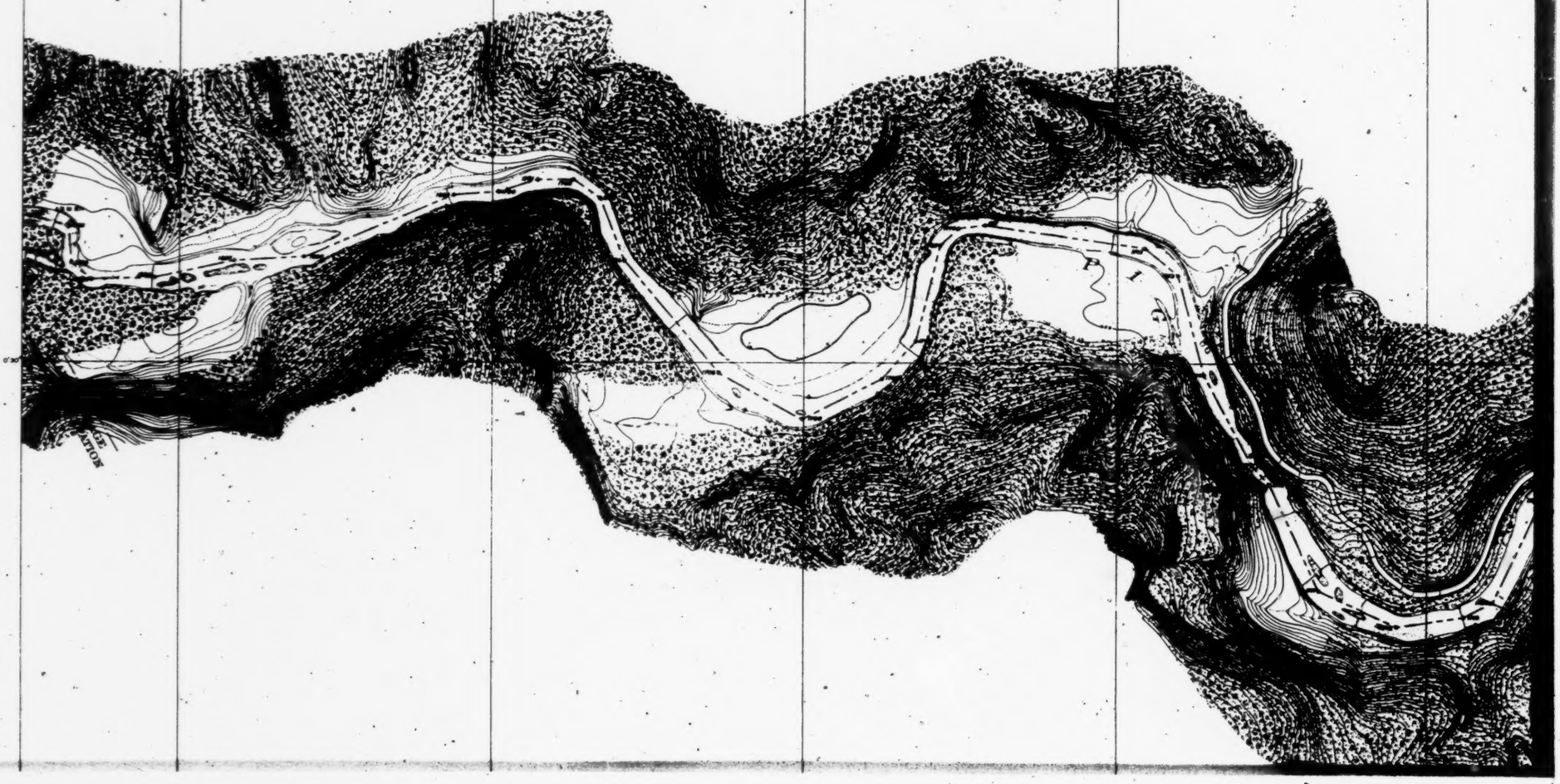
IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

EXHIBIT-B

CANADA

ONTARIO

THUNDER BAY DISTRIC



INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

SHEET No. 35

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER
O.H. TITTMANN, 1908-1915
E.C. BARNARD, 1915-1921
E. LESTER JONES, 1921-1929
JAMES H. VAN WAGENEN, 1929-

HIS BRITANNIC MAJESTY'S COMMISSIONER
W. F. KING, 1908-1918
J.J. McARTHUR, 1917-1934
J.D. CRAIG, 1925-

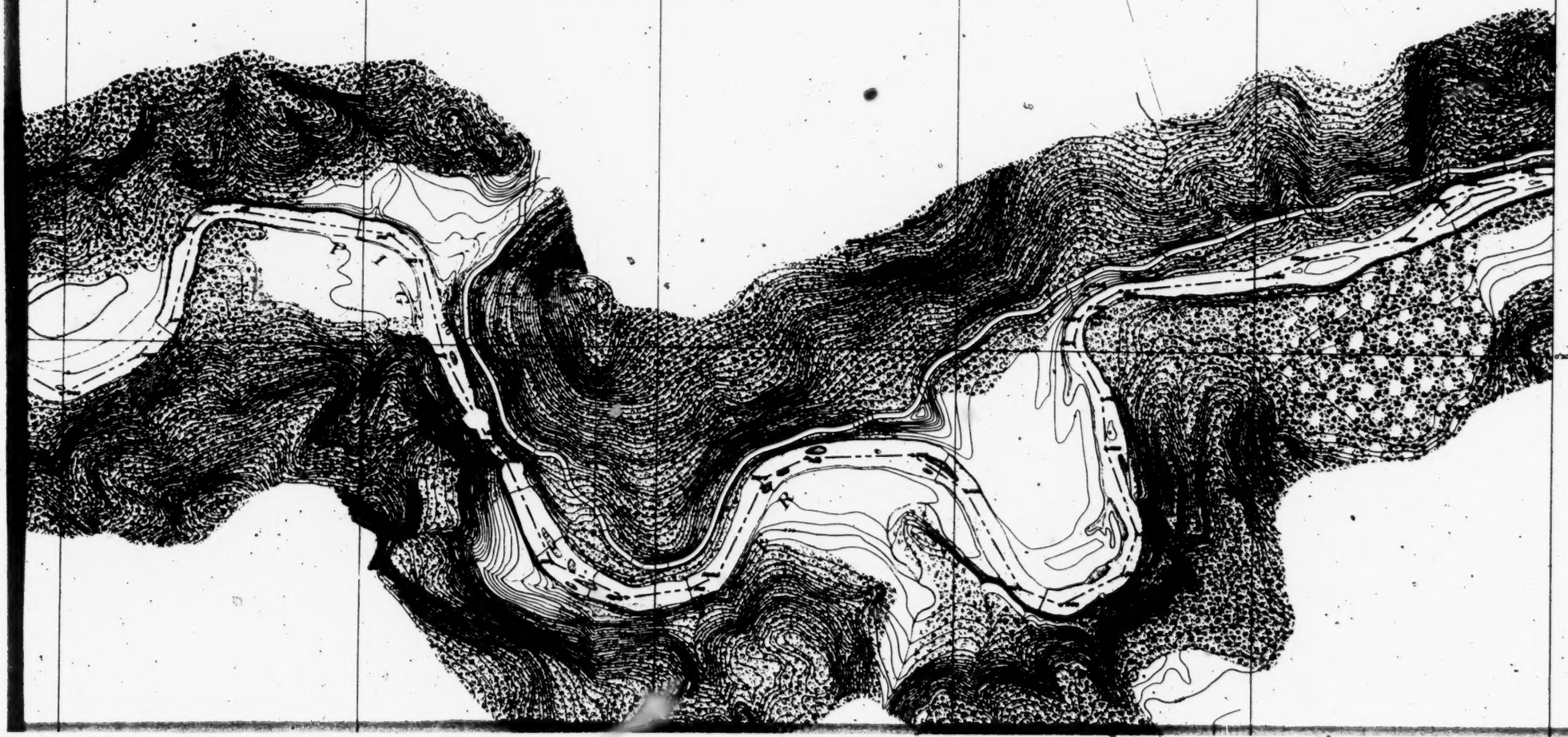
IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

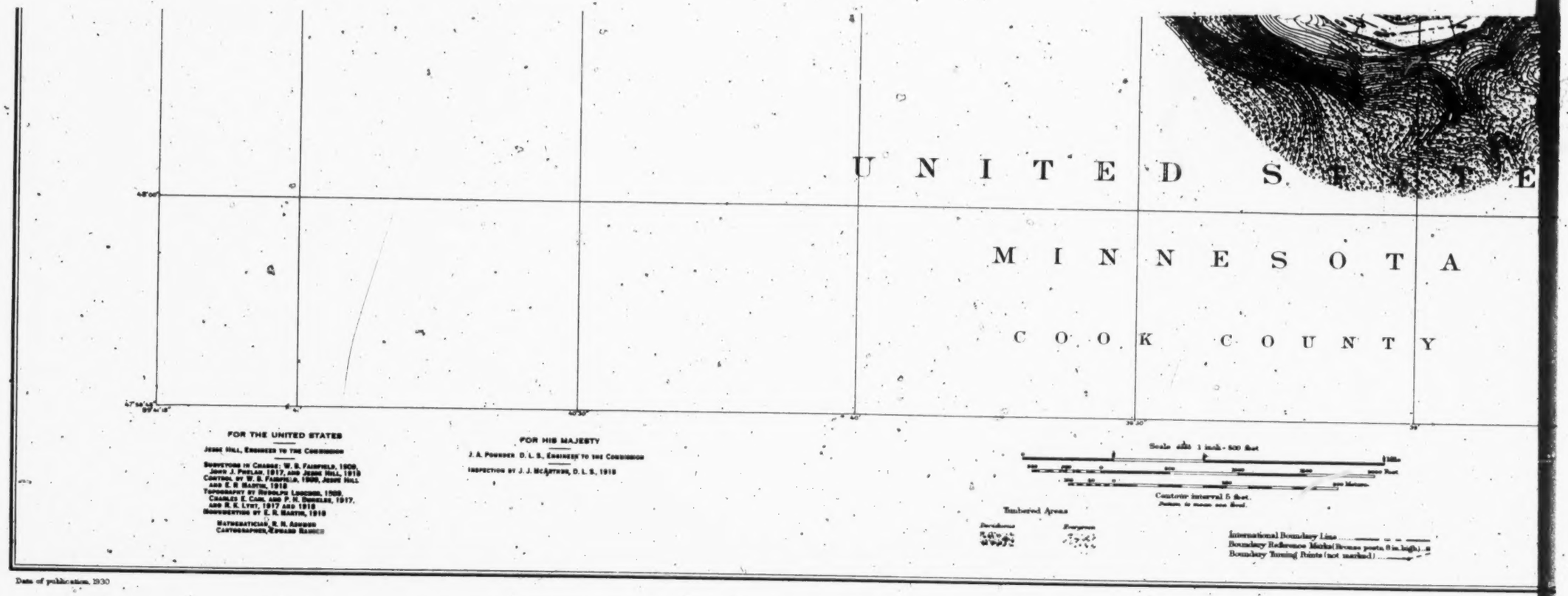
EXHIBIT-B

C A N A D A

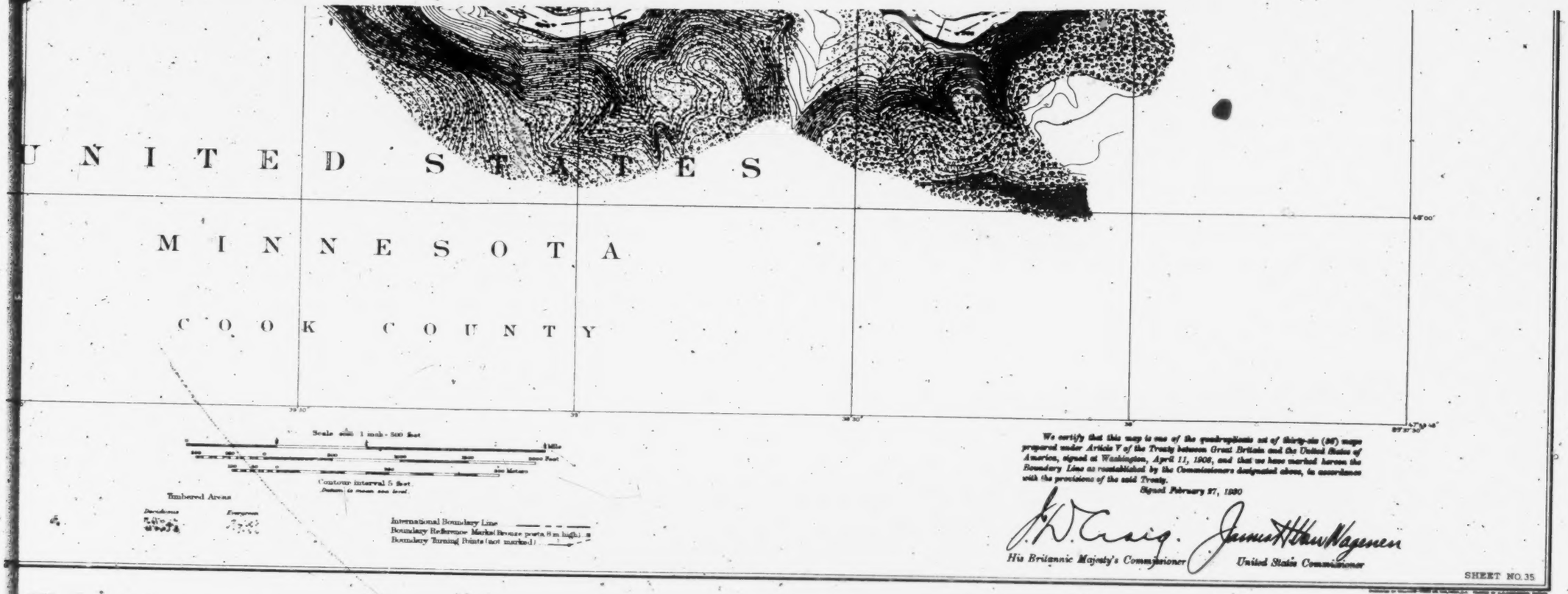
O N T A R I O

T H U N D E R B A Y D I S T R I C T





Date of publication, 1930



We certify that this map is one of the quadruplicate set of thirty-six (36) maps prepared under Article V of the Treaty between Great Britain and the United States of America, signed at Washington, April 11, 1908, and that we have marked hereon the Boundary Line as reestablished by the Commissioners designated above, in accordance with the provisions of the said Treaty.

Signed February 27, 1930

J. W. Craig.
His Britannic Majesty's Commissioner

James Hawgenen
United States Commissioner

SHEET NO. 35

No. 2704

United States of America

Department of State

To all to whom these presents shall come,--Greeting:

I Certify That the document hereunto annexed is under the Seal of the International Boundary Commission, United States, Alaska, and Canada, and that James H. Van Wagenen, whose name is subscribed thereunto, is the Commissioner for the United States.

In Testimony Whereof, I, William R. Castle, Jr. Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this thirteenth day of May, 1932.

Seal
Department of State
United States of
America

WILLIAM R. CASTLE, JR.
Acting Secretary of State.
By (Signature illegible), Chief Clerk.

International Boundary Commission

United States, Alaska, and Canada

United States Section

Address all Communications to
International Boundary Commission
United States, Alaska, and Canada
Washington, D. C.

James H. Van Wagenen, United States Commissioner
Noel J. Ogilvie, Canadian Commissioner

Washington, May 13, 1932

I hereby certify that the attached map is a true copy of Sheet No. 34 of the set of thirty-six maps of the International Boundary Line from the Northwesternmost Point of Lake of the Woods to Lake Superior, as reestablished by the Commissioners in accordance with the provisions of Article V of the Treaty between Great Britain and the United States of America, signed at Washington April 11, 1908.

JAMES H. VAN WAGENEN,
United States Commissioner.

Seal
International Boundary Commission
United States Section
United States-Alaska-Canada

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

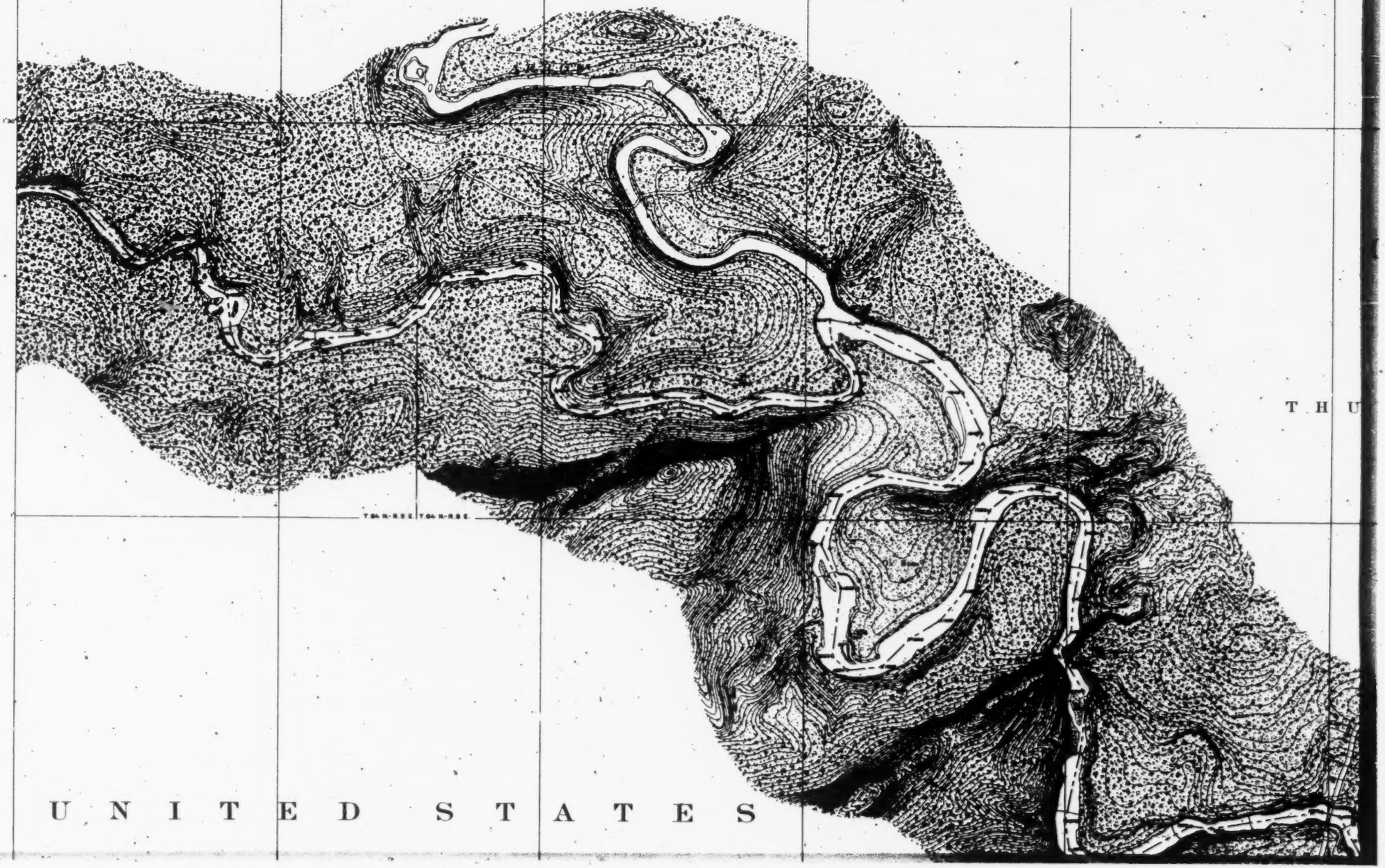
SHEET No. 34

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
O.H. TITTMANN, 1908-1915	W.F. KING, 1908-1918
E.C. BARNARD, 1915-1921	J.J. McARTHUR, 1917-1924
E. LESTER JONES, 1921-1929	J.O. CRAIG, 1925-
JAMES H. VAN WAGENEN, 1929-	

IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

EXHIBIT-C



INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

SHEET No. 34

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
O.H. TITTMANN, 1908-1915	W.F. KING, 1908-1916
E.C. BARNARD, 1915-1921	J.J. McARTHUR, 1917-1924
E. LESTER JONES, 1921-1929	J.B. CRAIG, 1925-
JAMES K. VAN WAGENEN, 1929-	

IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

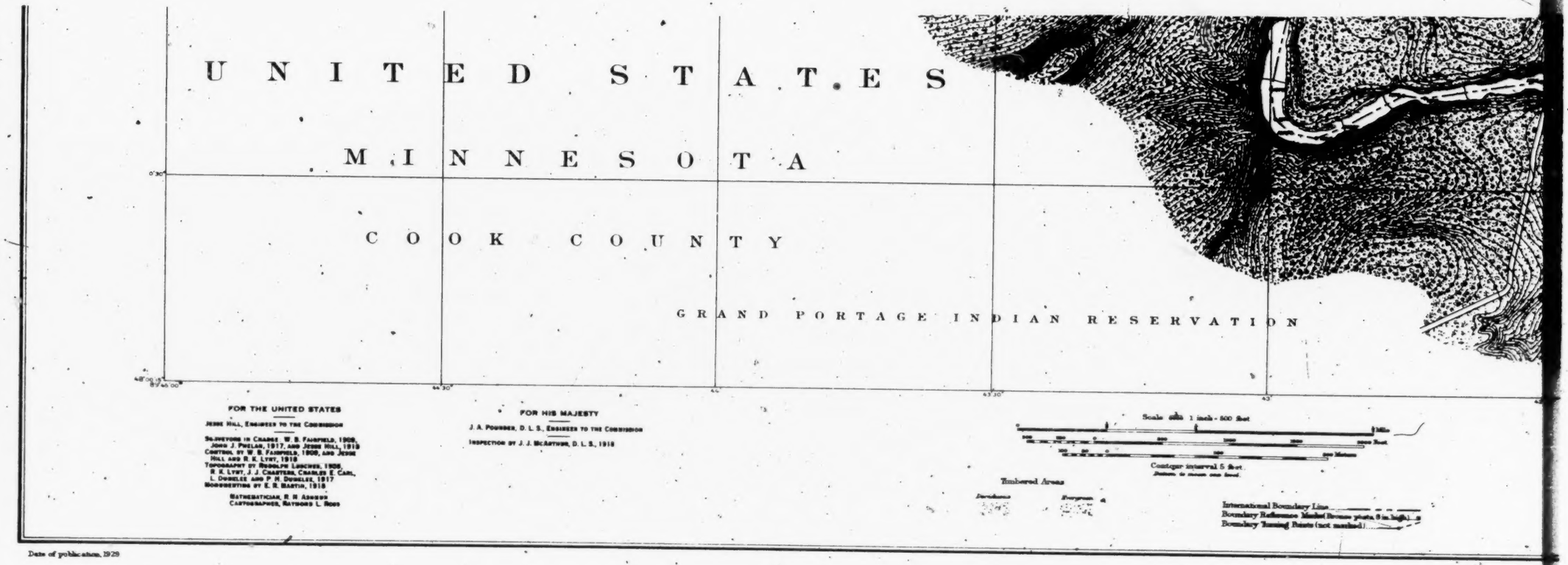
EXHIBIT C

C A N A D A

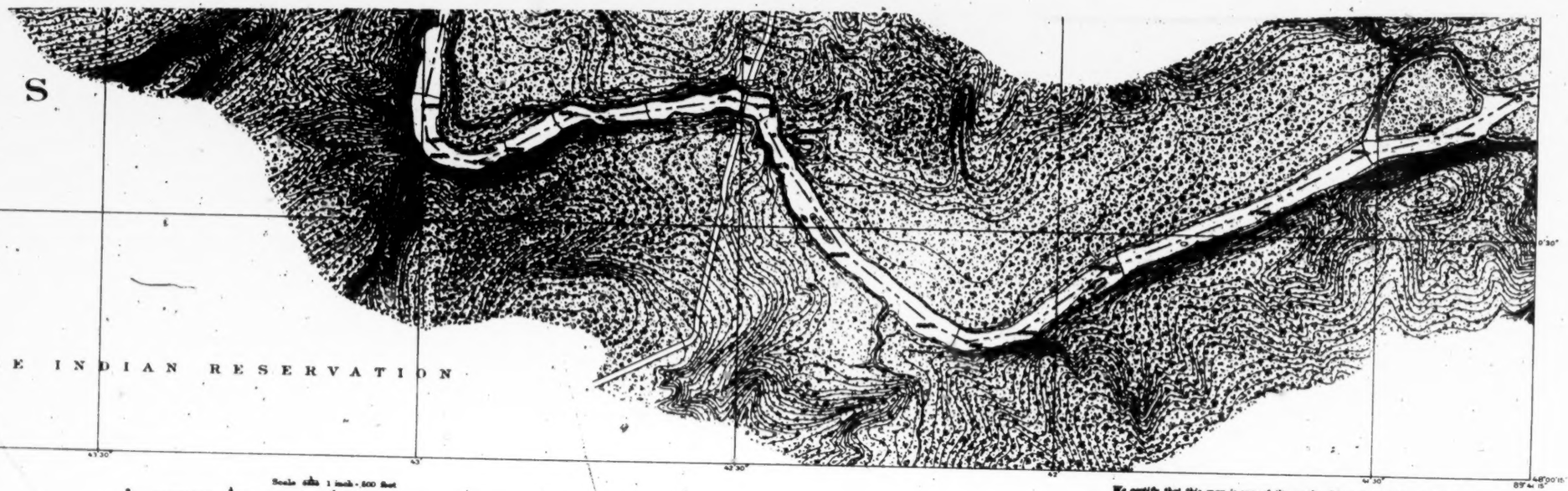
ONTARIO

THUNDER BAY DISTRICT

T E S



Date of publication 1929



We certify that this map is one of the quadruplicate set of thirty-six (36) maps prepared under Article V of the Treaty between Great Britain and the United States of America, signed at Washington, April 11, 1908, and that we there marked hereon the Boundary Line as reestablished by the Commissioners designated above, in accordance with the provisions of the said Treaty.

Signed November 20, 1920

His Britannic Majesty's Commissioner — *United States Commissioner*

SHEET NO. 34

No. 2702

United States of America

Department of State

To all to whom these presents shall come,—Greeting:

I Certify That the document hereunto annexed is under the Seal of the International Boundary Commission, United States, Alaska, and Canada, and that James H. Van Wagenen, whose name is subscribed thereunto, is the Commissioner for the United States.

In Testimony Whereof, I, William R. Castle, Jr. Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this thirteenth day of May, 1932.

Seal
Department of State
United States of
America

WILLIAM R. CASTLE, JR.
Acting Secretary of State.
By (Signature illegible), Chief Clerk.

International Boundary Commission

United States, Alaska, and Canada

United States Section

Address all Communications to
International Boundary Commission
United States, Alaska, and Canada
Washington, D. C.

James H. Van Wagenen, United States Commissioner
Noel J. Ogilvie, Canadian Commissioner

Washington, May 13, 1932

I hereby certify that the attached map is a true copy of Sheet No. 33 of the set of thirty-six maps of the International Boundary Line from the Northwesternmost Point of Lake of the Woods to Lake Superior, as reestablished by the Commissioners in accordance with the provisions of Article V of the Treaty between Great Britain and the United States of America, signed at Washington April 11, 1908.

JAMES H. VAN WAGENEN,
United States Commissioner.

Seal
International Boundary Commission
United States Section
United States-Alaska-Canada

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR.

SHEET No. 33

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
O. H. TITTMANN, 1908 - 1915	W. F. KING, 1908 - 1915
E. C. BARNARD, 1915 - 1921	J. J. McARTHUR, 1917 - 1924
E. LESTER JONES, 1921 - 1929	J. D. CRAIG, 1925 -
JAMES H. VAN WAGENEN, 1929 -	

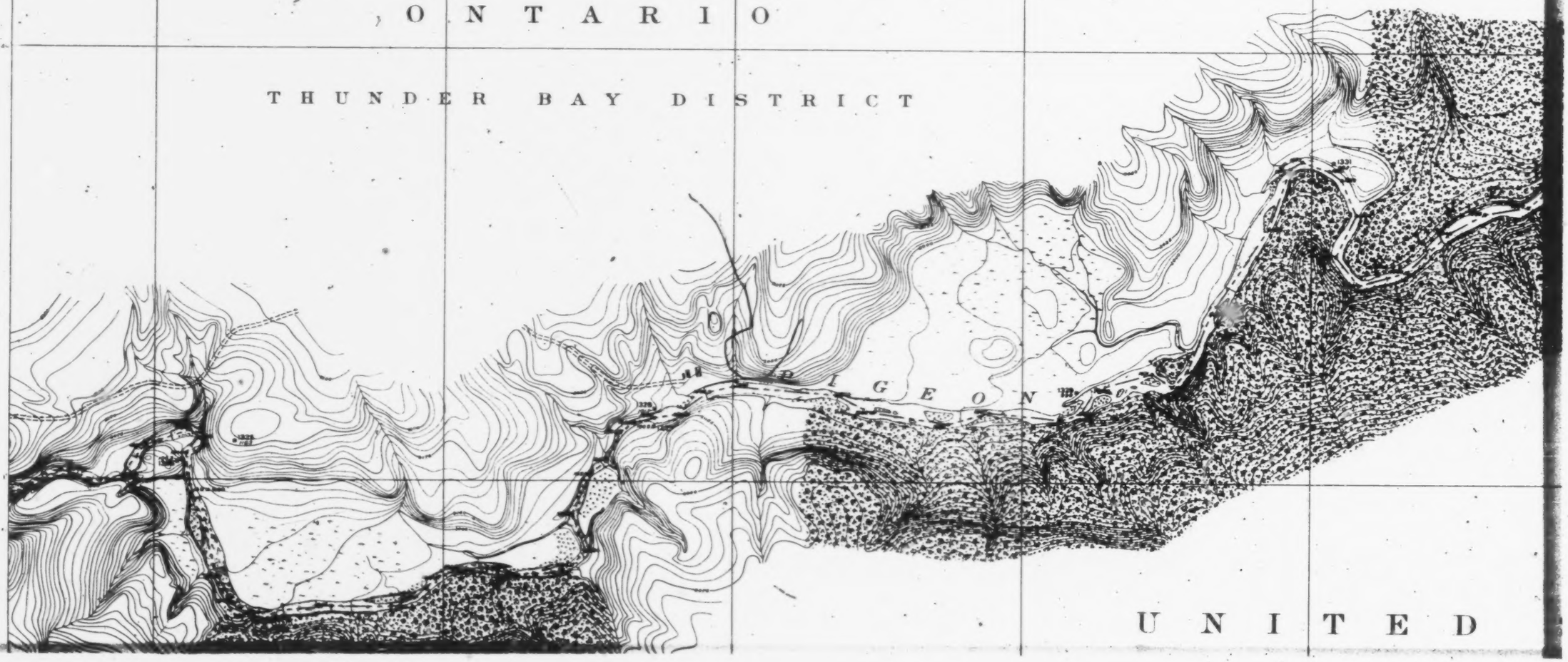
IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

EXHIBIT-D

C A N A D A

O N T A R I O

THUNDER BAY DISTRICT



U N I T E D

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

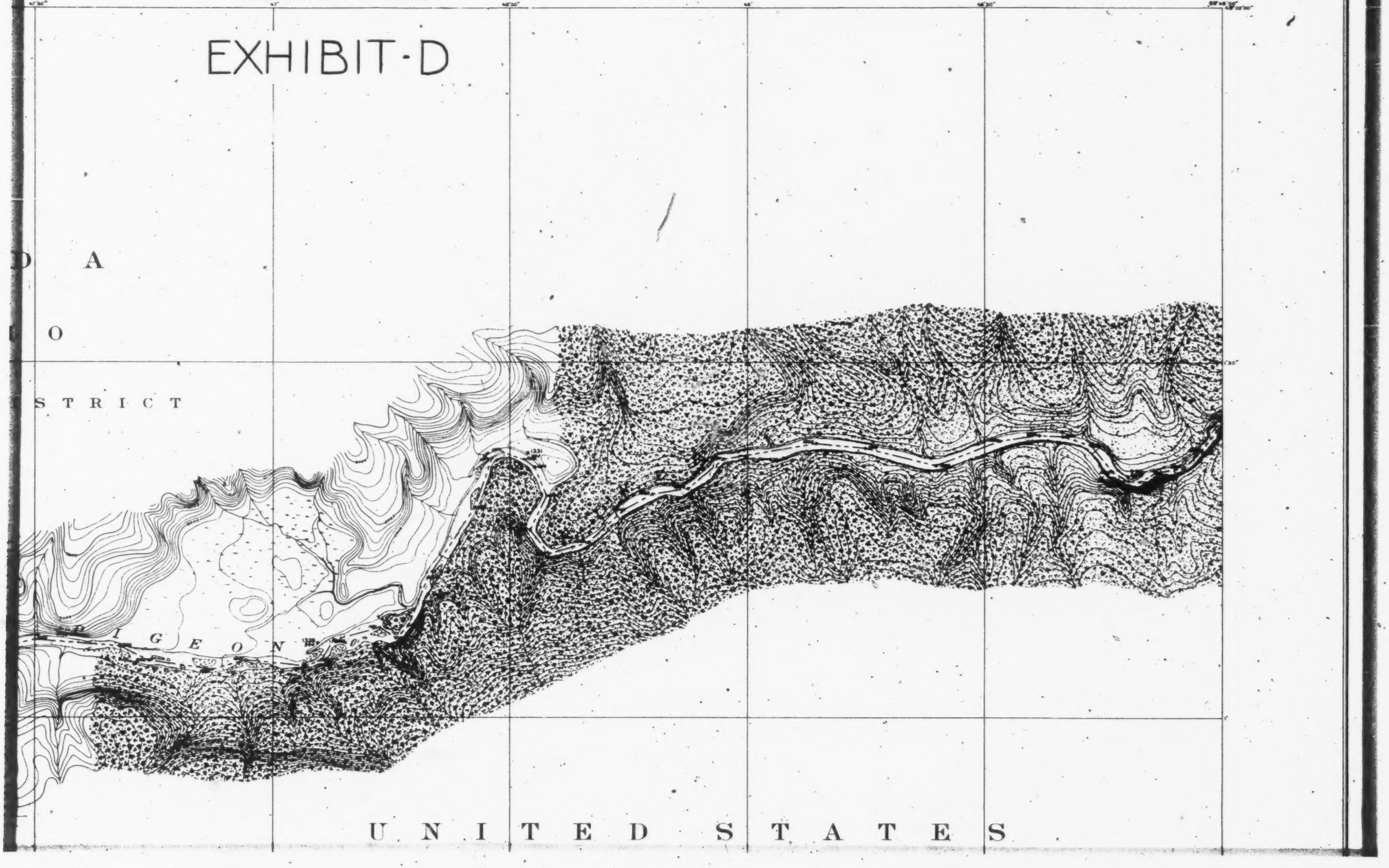
SHEET No. 33

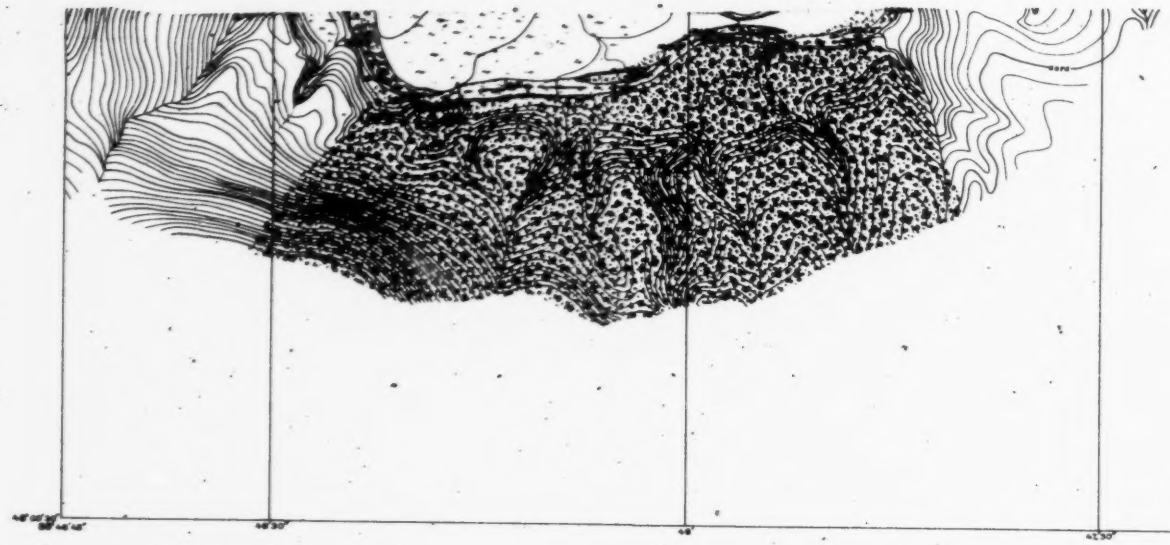
SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
O.H. TITTMANN, 1908-1915	W.F. KING, 1908-1946
E.C. BARNARD, 1915-1921	J.J. McARTHUR, 1917-1924
E. LESTER JONES, 1921-1929	J.D. CRAIG, 1925-
JAMES H. VAN WAGENEN, 1929-	

IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

EXHIBIT-D





U N I T E D

M I N N

C O O K

GRAND PORTAGE INDIAN RESERVATION

FOR THE UNITED STATES

JESSE HILL, ENGINEER TO THE COMMISSION

SURVEYORS IN CHARGE:—W. S. FAIRFIELD, 1908, JOHN J. PRELAR, 1917, AND JESSE HILL, 1918
CONTROL BY W. S. FAIRFIELD, 1908, AND JESSE HILL AND R. E. LYNT, 1918
TOPOGRAPHY BY RUDOLPH LOBDELL, 1908, J. J. CHARTIER, CHARLES T. CARL, AND L. DWELLEY 1917, AND R. E. LYNT, 1917, AND 1918
SUPERVISING BY E. R. MARTH, 1918

MATHEMATICIAN, S. H. ANDERSON
CARTOGRAPHER, RAYMOND L. REES

FOR HIS MAJESTY

J. A. POUDRIER, D. L. S., ENGINEER TO THE COMMISSION

INSPECTION BY J. J. MCARTHUR, D. L. S., 1918

Scale 1 inch = 800 feet

Contour interval 5 feet.

Timbered Areas

Deciduous Evergreen

International Boundary Line
Boundary Reference Marks (Bronze posts 6 in high)
Boundary Turning Points (not marked)

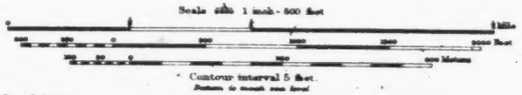
Date of publication, 1919

UNITED STATES

MINNESOTA

COOK COUNTY

GRAND PORTAGE INDIAN RESERVATION



Timbered Areas

Boundary Monument

Evergreen

International Boundary Line

Boundary Reference Marks (Bronze posts, 6 in high).

Boundary Turning Points (not marked)

We certify that this map is one of the quadruplicate set of thirty-six (36) maps prepared under Article V of the Treaty between Great Britain and the United States of America, signed at Washington, April 11, 1908, and that we have marked hereon the Boundary Line as reestablished by the Commissioners designated above, in accordance with the provisions of the said Treaty.

Signed November 20, 1909

J. W. Craig. James Hawgood

His Britannic Majesty's Commissioner *United States Commissioner*

SHEET NO. 33

No. 2700

United States of America

Department of State

To all to whom these presents shall come,—Greeting:

I Certify That the document hereunto annexed is under the Seal of the International Boundary Commission, United States, Alaska, and Canada, and that James H. Van Wagenen, whose name is subscribed thereunto, is the Commissioner for the United States.

In Testimony Whereof, I, William R. Castle, Jr. Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this thirteenth day of May, 1932.

Seal
Department of State
United States of America

WILLIAM R. CASTLE, JR.
Acting Secretary of State.
By (Signature illegible), Chief Clerk.

International Boundary Commission

United States, Alaska, and Canada

United States Section

Address all Communications to
International Boundary Commission
United States, Alaska, and Canada
Washington, D. C.

James H. Van Wagenen, United States Commissioner
Noel J. Ogilvie, Canadian Commissioner

Washington, May 13, 1932

I hereby certify that the attached map is a true copy of Sheet No. 32 of the set of thirty-six maps of the International Boundary Line from the Northwesternmost Point of Lake of the Woods to Lake Superior, as reestablished by the Commissioners in accordance with the provisions of Article V of the Treaty between Great Britain and the United States of America, signed at Washington April 11, 1908.

JAMES H. VAN WAGENEN,
United States Commissioner.

Seal
International Boundary Commission
United States Section
United States-Alaska-Canada

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

SHEET No. 32

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER
O.H. TITTMANN, 1908-1909
E.C. BARNARD, 1915-1921
E. LESTER JONES, 1921-1929
JAMES M. VAN HAGENER, 1929-

HIS BRITANNIC MAJESTY'S COMMISSIONER
W.F. KING, 1908-1918
J.J. McARTHUR, 1917-1924
J.D. CRAIG, 1925-

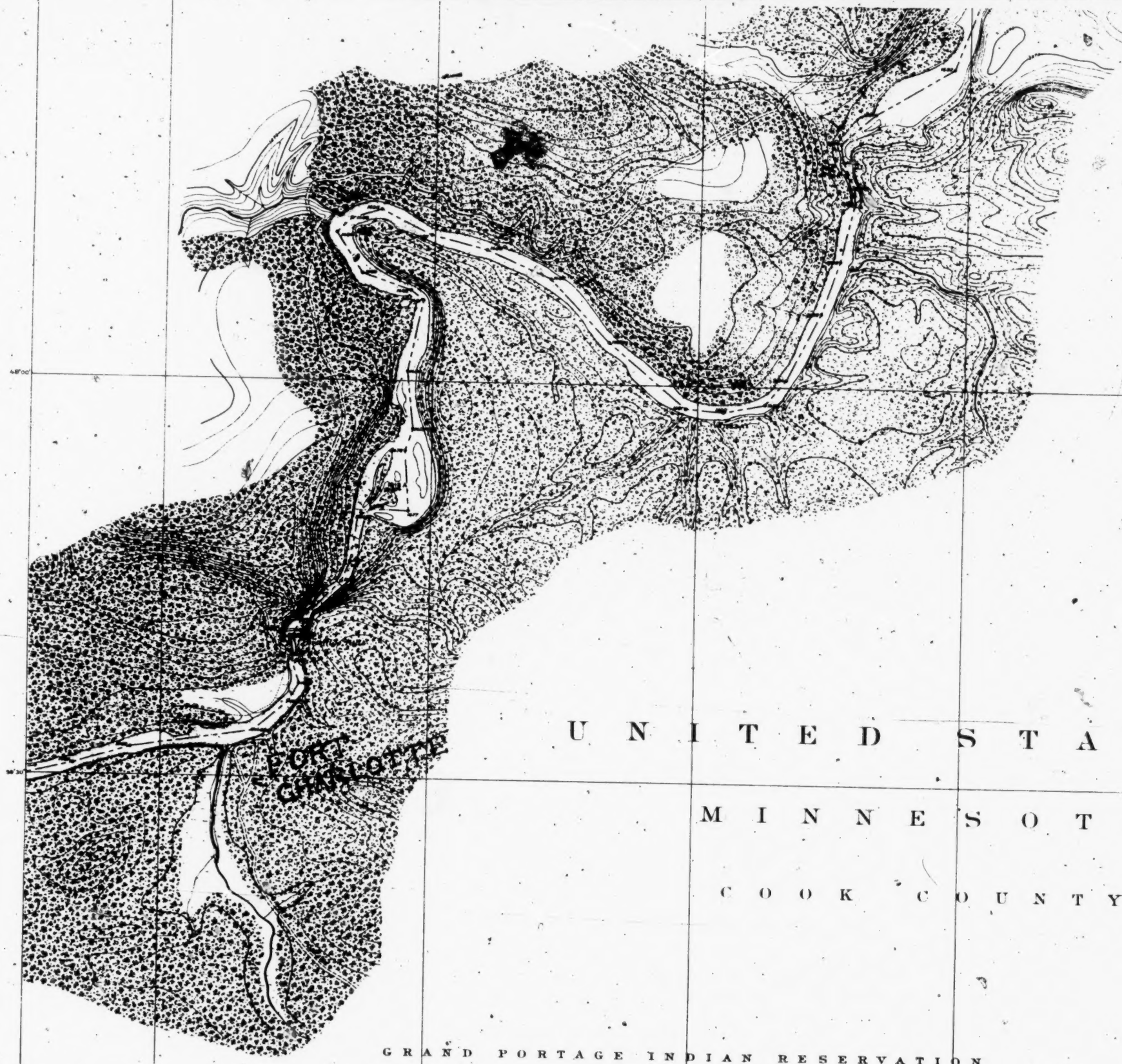
IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

EXHIBIT-E

C A N A D A

O N T A R I O

T H U N D E R B A Y D I S T R I C T



UNITED STATES

MINNESOTA

COOK COUNTY

GRAND PORTAGE INDIAN RESERVATION

MINNESOTA

COOK COUNTY

GRAND PORTAGE INDIAN RESERVATION

FOR THE UNITED STATES

JESSE HILL, ENGINEER TO THE COMMISSION

SURVEYING IN CANADA: W. B. FAIRFIELD, 1908, JESSE J. PHELAN, 1917, AND JESSE HILL, 1918
COMPUTING BY W. B. FAIRFIELD, 1909, AND JESSE HILL AND R. E. LYST, 1918
TOPOGRAPHY BY RUDOLPH LINDENS, 1908, J. J. CROOTTEN, CHARLES E. CARR, AND L. DONELSE 1917, AND R. E. LYST, 1917 AND 1918
REDUCTION BY E. R. MARVIN, 1918

PHOTOGRAPHED, E. R. ARMSTRONG
CHROMOGRAPHED, RAYMOND L. BAKE

FOR HIS MAJESTY

J. A. FOOTNER, D. L. S., ENGINEER TO THE COMMISSION

INSPECTION BY J. J. MCARTHUR, D. L. S., 1918

Scale 2000 1 inch = 800 feet

Contour interval 5 feet.

Enlarged Areas

International Boundary Line
Boundary Reference Marks (Bronze posts, 6 in. high)
Boundary Turning Points (not marked)

We certify that this map is one of the quadruplicate set of thirty-six (36) maps prepared under Article V of the Treaty between Great Britain and the United States of America, signed at Washington, April 11, 1908, and that we have marked hereon the Boundary Line as reestablished by the Commissioners designated above, in accordance with the provisions of the said Treaty.

Signed December 20, 1920

J. W. Craig
His Britannic Majesty's Commissioner

James Hawes Wagoner
United States Commissioner

SHEET NO. 32

Date of publication, 1929

No. 2698

United States of America

Department of State

To all to whom these presents shall come,—Greeting:

I Certify That the document hereunto annexed is under the Seal of the International Boundary Commission, United States, Alaska, and Canada, and that James H. Van Wagenen, whose name is subscribed thereunto, is the Commissioner for the United States.

In Testimony Whereof, I, William R. Castle, Jr. Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this thirteenth day of May, 1932.

Seal
Department of State
United States of
America

WILLIAM R. CASTLE, JR.
Acting Secretary of State.
By (Signature illegible), Chief Clerk.

International Boundary Commission

United States, Alaska, and Canada

United States Section

Address all Communications to
International Boundary Commission
United States, Alaska, and Canada
Washington, D. C.

James H. Van Wagenen, United States Commissioner
Noel J. Ogilvie, Canadian Commissioner

Washington, May 13, 1932

I hereby certify that the attached map is a true copy of Sheet No. 31 of the set of thirty-six maps of the International Boundary Line from the Northwesternmost Point of Lake of the Woods to Lake Superior, as reestablished by the Commissioners in accordance with the provisions of Article V of the Treaty between Great Britain and the United States of America, signed at Washington April 11, 1908.

JAMES H. VAN WAGENEN,
United States Commissioner.

Seal
International Boundary Commission
United States Section
United States-Alaska-Canada

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

SHEET No. 31

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER
G.H. TITTMANN, 1908-1910
E.C. BARNARD, 1908-1921
E. LESTER JONES, 1921-1929
JAMES H. VAN WAGENEN, 1929-

HIS BRITANNIC MAJESTY'S COMMISSIONER
W.F. KING, 1908-1915
J.J. McARTHUR, 1917-1924
J.D. CRAIG, 1925-

IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

EXHIBIT-F

C A N A D A

O N T A R I O

T H U N D E R B A Y D I S T R I C T

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

SHEET No. 31

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
G.R. TITTMANN, 1908–1915	W.F. KING, 1908–1915
E.C. BARNARD, 1915–1921	J.J. McARTHUR, 1917–1934
E. LESTER JONES, 1921–1929	J.D. CRAIG, 1925–
JAMES H. VAN WAGENEN, 1929–	

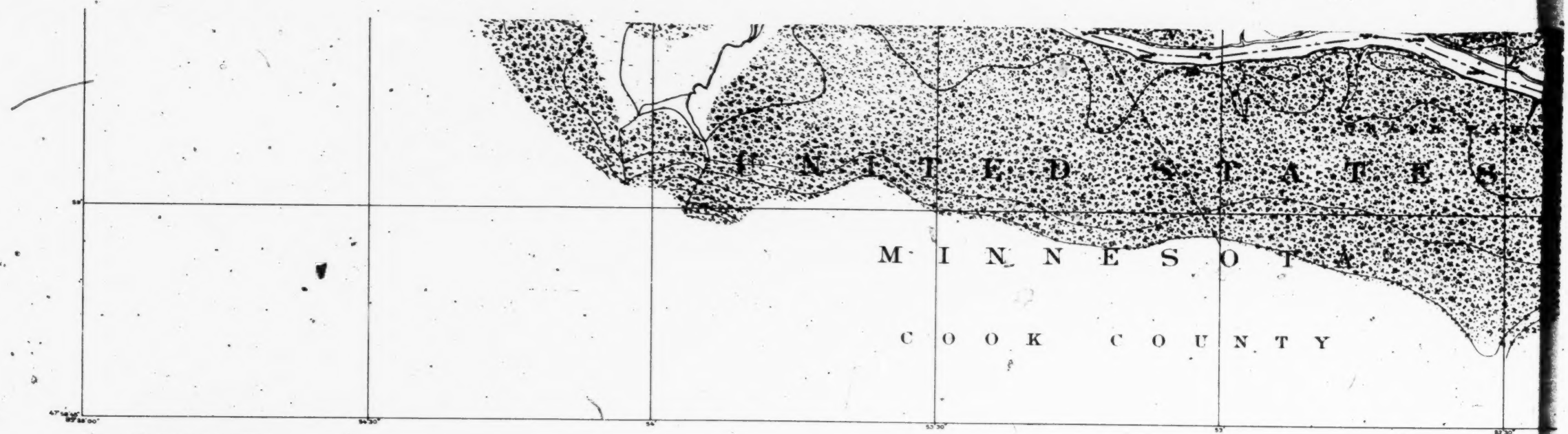
IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

EXHIBIT-F

C A N A D A

O N T A R I O

T H U N D E R B A Y D I S T R I C T



FOR THE UNITED STATES

JESSE HILL, ENGINEER IN THE CHARGE

SURVEYORS IN CHARGE: W. S. FAIRFIELD, 1908, JOHN J. PHELAN, 1917, AND JESSE HILL, 1918
CONTROL BY W. S. FAIRFIELD, 1908, AND JESSE HILL AND R. E. LYNT, 1918
TOPOGRAPHY BY RUDOLPH LOSCHER, 1908, AND R. E. LYNT, J. J. CHANTERS, CHARLES E. CARL, L. DONELSON, AND P. H. DONELSON, 1917
REVISIONS BY E. R. MARTIN, 1918

MATHEMATICIAN, R. H. ASHTON
CARTOGRAPHER, RAYMOND L. ROSS

FOR HIS MAJESTY

J. A. POCOCK D. L. S., ENGINEER IN THE CHARGE

INSPECTION BY J. J. MCARTHUR D. L. S., 1918

Scale one inch = 500 feet

Contour interval 5 feet

Elevations in meters above datum

Timbered Areas

Deciduous

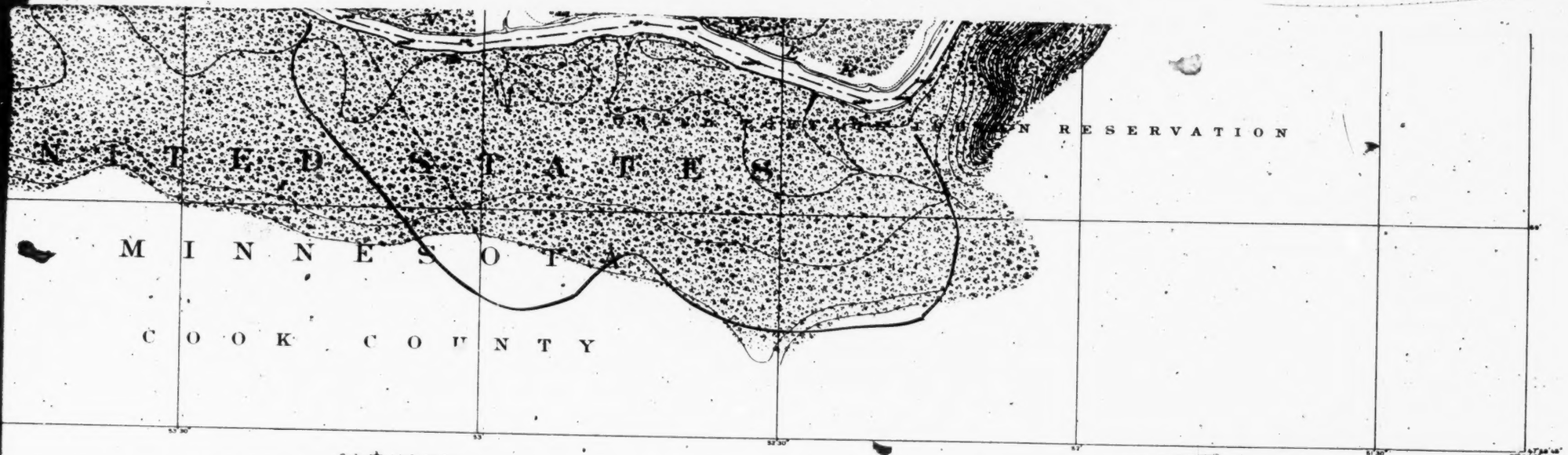
Evergreen

International Boundary Line

Boundary Reference Marks (Bronze posts 6 in. high)

Boundary Turning Points (not marked)

Date of publication, 1919



Scale 40in 1 inch - 500 feet

Contour interval 5 feet

Timbered Areas

International Boundary Line

Boundary Reference Marks (Bronze posts 6 in. high)

Boundary Stone[Posts (not marked)

We certify that this map is one of the quadruplicate set of thirty-six (36) maps prepared under Article V of the Treaty between Great Britain and the United States of America, signed at Washington, April 11, 1908, and that we have marked hereon the Boundary Line as reestablished by the Commissioners designated above, in accordance with the provisions of the said Treaty.

Signed September 26, 1910

J. W. Craig. James Hamilton Wagner

His Britannic Majesty's Commissioner — United States Commissioner

SHEET NO. 31

19a

No. 2696

United States of America

Department of State

To all to whom these presents shall come,—Greeting:

I Certify That the document hereunto annexed is under the Seal of the International Boundary Commission, United States, Alaska, and Canada, and that James H. Van Wagenen, whose name is subscribed thereunto, is the Commissioner for the United States.

In Testimony Whereof, I, William R. Castle, Jr. Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this thirteenth day of May, 1932.

Seal
Department of State
United States of
America

WILLIAM R. CASTLE, JR.
Acting Secretary of State.
By (Signature illegible), Chief Clerk.

19b

International Boundary Commission

United States, Alaska, and Canada

United States Section

Address all Communications to
International Boundary Commission
United States, Alaska, and Canada
Washington, D. C.

James H. Van Wagenen, United States Commissioner
Noel J. Ogilvie, Canadian Commissioner

Washington, May 13, 1932

I hereby certify that the attached map is a true copy of Sheet No. 30 of the set of thirty-six maps of the International Boundary Line from the Northwesternmost Point of Lake of the Woods to Lake Superior, as reestablished by the Commissioners in accordance with the provisions of Article V of the Treaty between Great Britain and the United States of America, signed at Washington April 11, 1908.

JAMES H. VAN WAGENEN,
United States Commissioner.

Seal
International Boundary Commission
United States Section
United States-Alaska-Canada

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

SHEET No. 30

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
O.H. TITTMANN, 1908-1915	W.F. KING, 1908-1918
E.C. BARNARD, 1915-1921	J.J. McARTHUR, 1917-1924
E. LESTER JONES, 1921-1929	J.D. CRAIG, 1925-
JAMES N. VAN WAGENEN, 1929-	

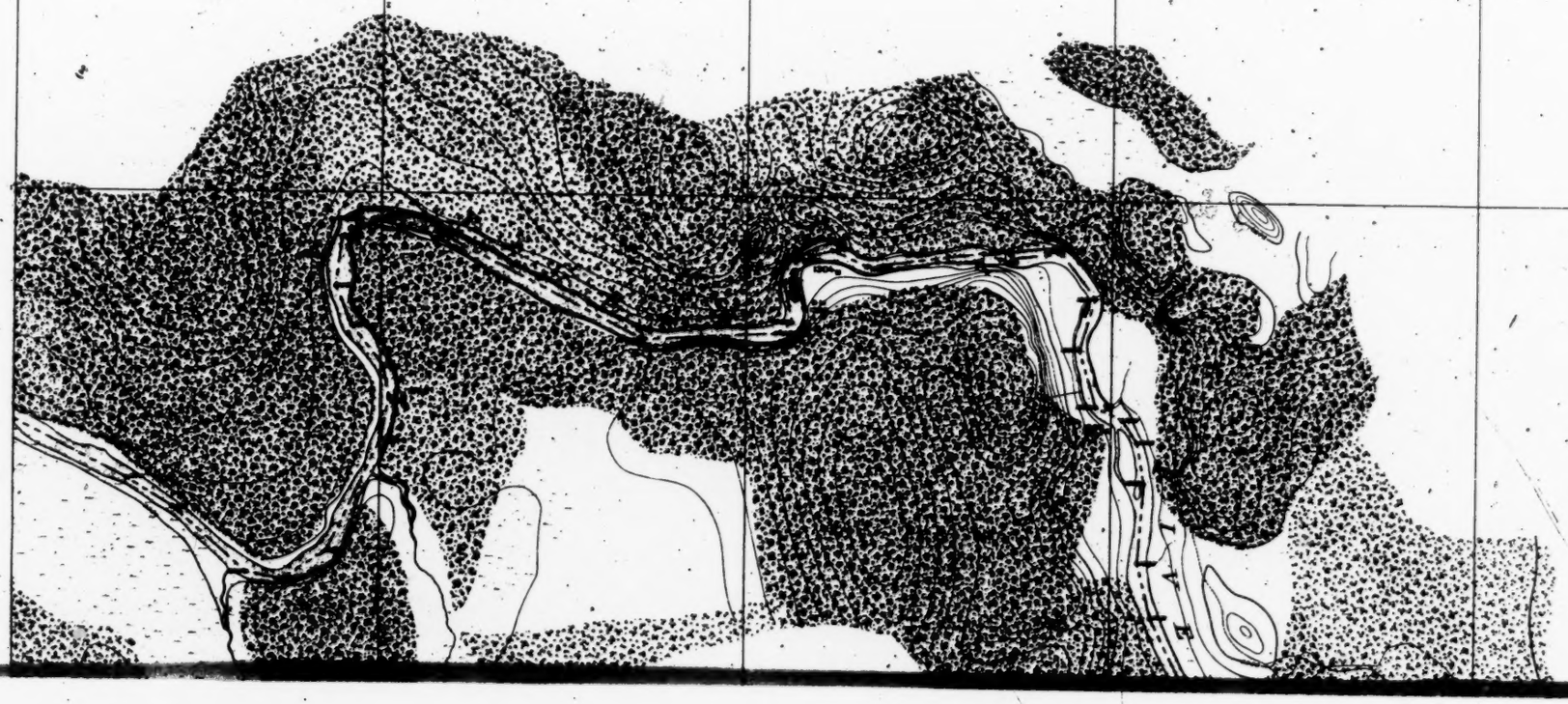
IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

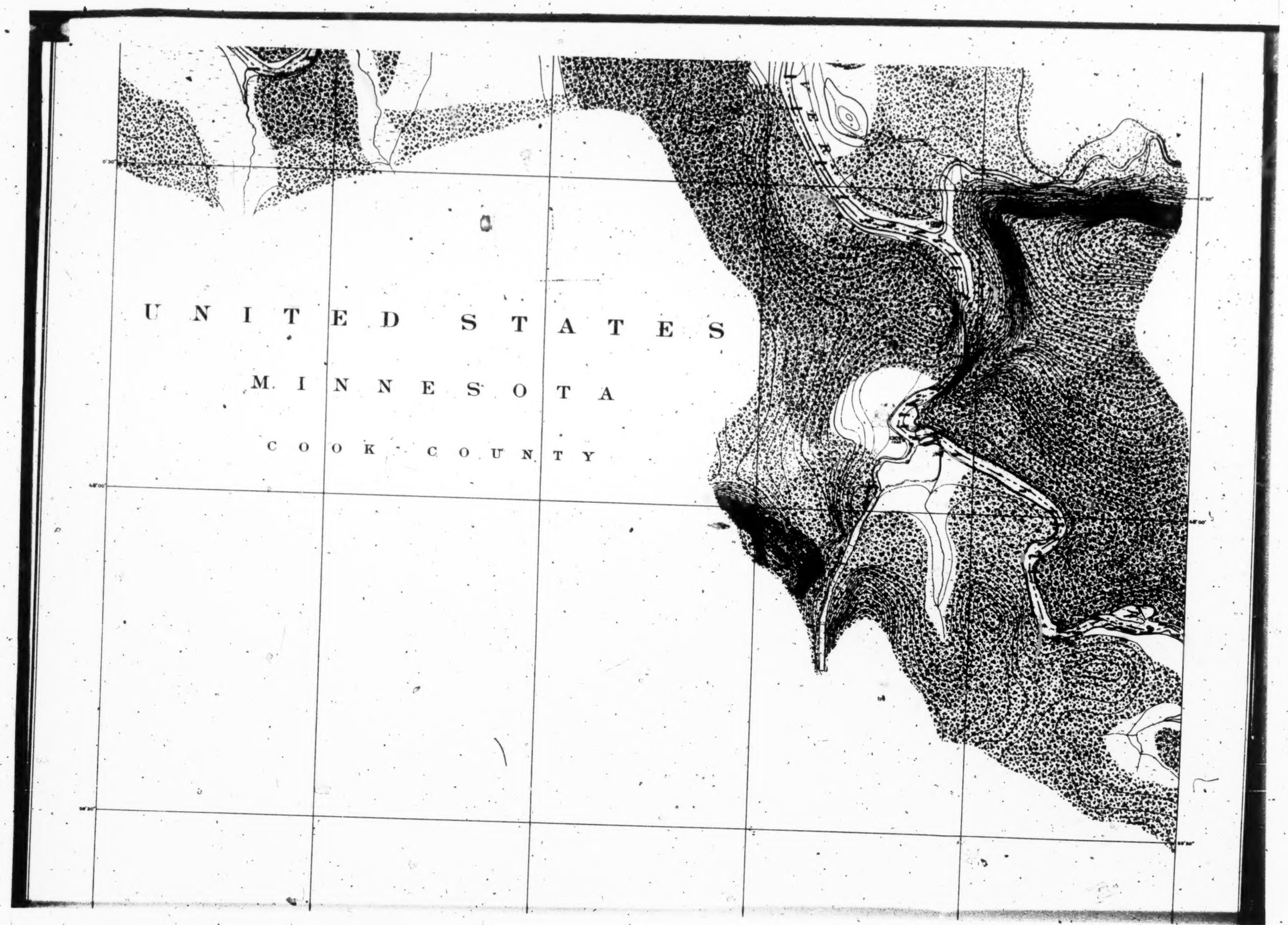
EXHIBIT G

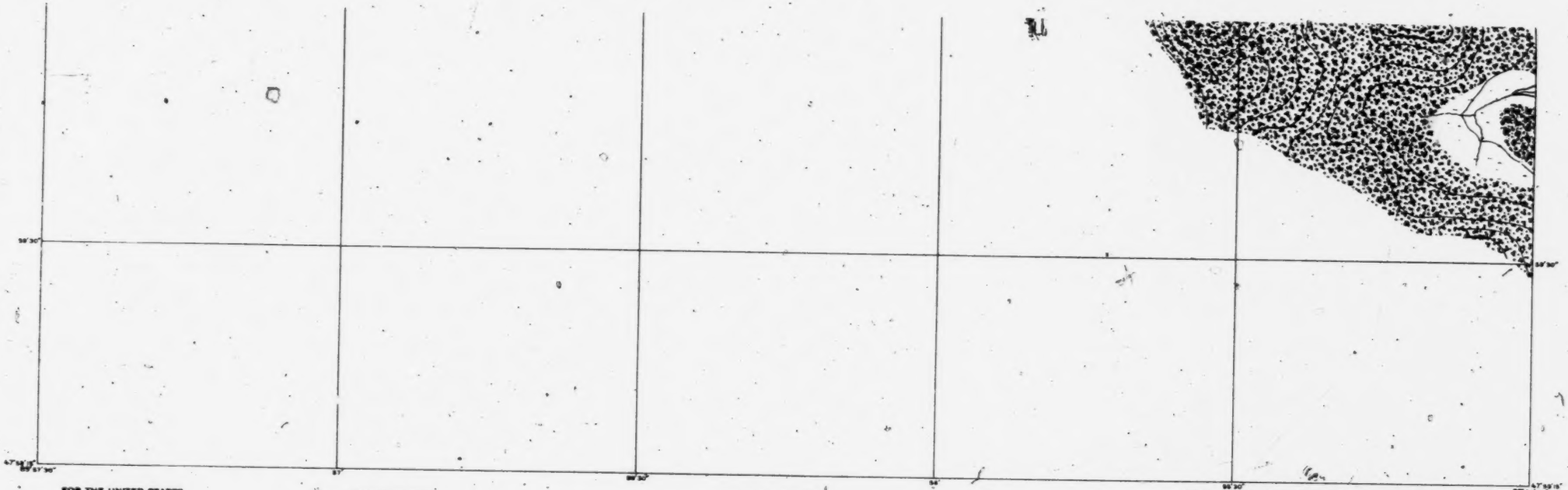
C A N A D A

O N T A R I O

T H U N D E R B A Y D I S T R I C T




UNITED STATES
MINNESOTA
COOK COUNTY



FOR THE UNITED STATES

JESSE HILL, ENGINEER TO THE COMMISSION

SURVEYORS IN CHARGE, W. S. FAIRFIELD, 1908, JOHN J. PUBLAN, 1917, AND JESSE HILL, 1918

CONTROL BY W. S. FAIRFIELD, 1909, R. K. LYOT, 1917, AND JESSE HILL, 1918

TOPOGRAPHY BY RUDOLPH LINDNER, 1908, R. K. LYOT, J. J. CRABTREE, L. DUNDLEE, AND P. H. DUNDLEE, 1917

SUPERVISION BY E. R. MARTIN, 1918

ASTRONOMICAL, R. H. ADDUCO
CARTOGRAPHER, RAYMOND L. ROSS

FOR HIS MAJESTY

J. A. PROVOST, D. L. S., ENGINEER TO THE COMMISSION

INSPECTION BY J. J. MCARTHUR, D. L. S., 1918

Scale 1 inch = 400 feet

Contour interval 5 feet.

Timbered Areas

International Boundary Line
Boundary Reference Marks (Bronze posts 6 in. high)
Boundary Turning Points (not marked)

We certify that this map is one of the quadruplicate set of thirty-six (36) maps prepared under Article V of the Treaty between Great Britain and the United States of America, signed at Washington, April 11, 1908, and that we have marked hereon the Boundary Line as reestablished by the Commissioners designated above, in accordance with the provisions of the said Treaty.

Signed September 26, 1929

J. W. Craig
His Britannic Majesty's Commissioner

James Hawgood
United States Commissioner

Date of publication, 1929

SHEET NO 30

No. 2694

United States of America

Department of State

To all to whom these presents shall come,—Greeting:

I Certify That the document hereunto annexed is under the Seal of the International Boundary Commission, United States, Alaska, and Canada, and that James H. Van Wagenen, whose name is subscribed thereunto, is the Commissioner for the United States.

In Testimony Whereof, I, William R. Castle, Jr. Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this thirteenth day of May, 1932.

Seal
Department of State
United States of
America

WILLIAM R. CASTLE, JR.
Acting Secretary of State.
By (Signature illegible), Chief Clerk.

International Boundary Commission

United States, Alaska, and Canada

United States Section

Address all Communications to
International Boundary Commission
United States, Alaska, and Canada
Washington, D. C.

James H. Van Wagenen, United States Commissioner
Noel J. Ogilvie, Canadian Commissioner

Washington, May 13, 1932

I hereby certify that the attached map is a true copy of Sheet No. 29 of the set of thirty-six maps of the International Boundary Line from the Northwesternmost Point of Lake of the Woods to Lake Superior, as reestablished by the Commissioners in accordance with the provisions of Article V of the Treaty between Great Britain and the United States of America, signed at Washington April 11, 1908.

JAMES H. VAN WAGENEN,
United States Commissioner.

Seal
International Boundary Commission
United States Section
United States-Alaska-Canada

INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

SHEET No. 29

SURVEYED UNDER THE DIRECTION OF

UNITED STATES COMMISSIONER	HIS BRITANNIC MAJESTY'S COMMISSIONER
O. H. TITTMANN, 1908-1915	W. F. KING, 1908-1918
E. C. BARNARD, 1915-1921	J. J. Mc ARTHUR, 1917-1924
E. LESTER JONES, 1921-1929	J. D. CRAIG, 1925-
JAMES H. VAN WAGENEN, 1929-	

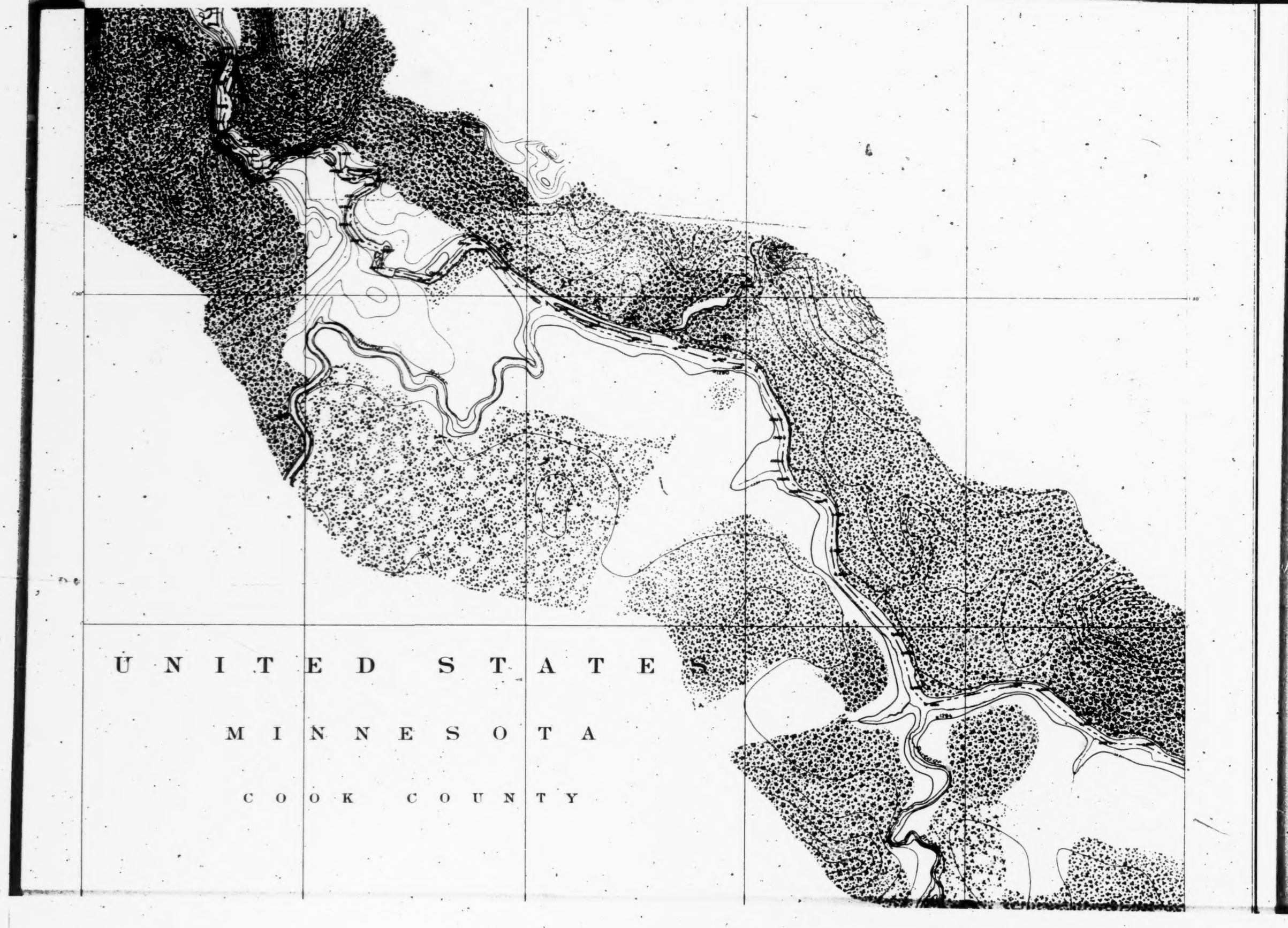
IN ACCORDANCE WITH ARTICLE V OF THE TREATY OF 1908

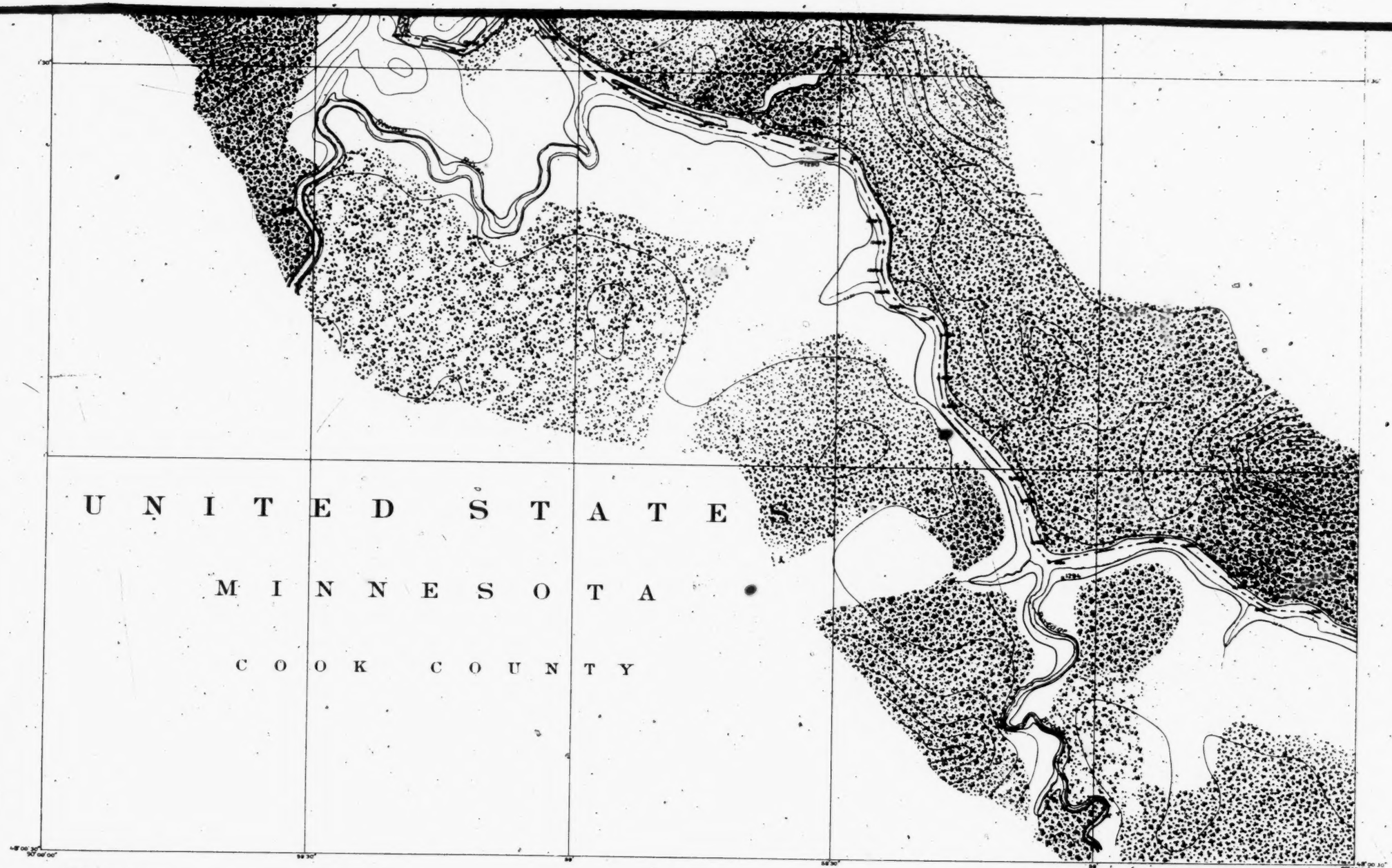
· EXHIBIT · H ·

C A N A D A

O N T A R I O

T H U N D E R B A Y D I S T R I C T


UNITED STATES
MINNESOTA
COOK COUNTY



FOR THE UNITED STATES

JESSE HILL, ENGINEER TO THE COMMISSION

SURVEYORS IN CHARGE: W. B. FAIRFIELD, 1909, JOHN J. PHELAN, 1917, AND JESSE HILL, 1917 AND 1918.
CONTROL BY W. B. FAIRFIELD, 1909, AND JESSE HILL, 1917 AND 1918.
TOPOGRAPHY BY RUDOLPH LINDNER, 1909, R. E. LYNT, J. J. CRABTREE, L. DOUGLAS, AND P. H. DOUGLAS, 1917.
BOUNDARIES BY E. R. MARTIN, 1918.

MATHEMATICIAN, R. H. ADDISON
CARTOGRAPHER, RAYMOND L. ROSS

FOR HIS MAJESTY

O. A. POWNER, D. L. S., ENGINEER TO THE COMMISSION

INSPECTION BY J. J. MCARTHUR, D. L. S., 1918

Scale 40 chs. 1 inch - 500 feet

Miles
Statute Feet
Metres

Contour interval 5 feet.
Datum is mean sea level.

Timbered Areas

Deciduous
Evergreen

International Boundary Line
Boundary Reference Marks (Bronze posts, 6 in. high)
Boundary Turning Points (not marked)

We certify that this map is one of the quadruplicate set of thirty-six (36) maps prepared under Article V of the Treaty between Great Britain and the United States of America, signed at Washington, April 11, 1908, and that we have marked hereon the Boundary Line as re-established by the Commissioners designated above, in accordance with the provisions of the said Treaty.

Signed September 25, 1920

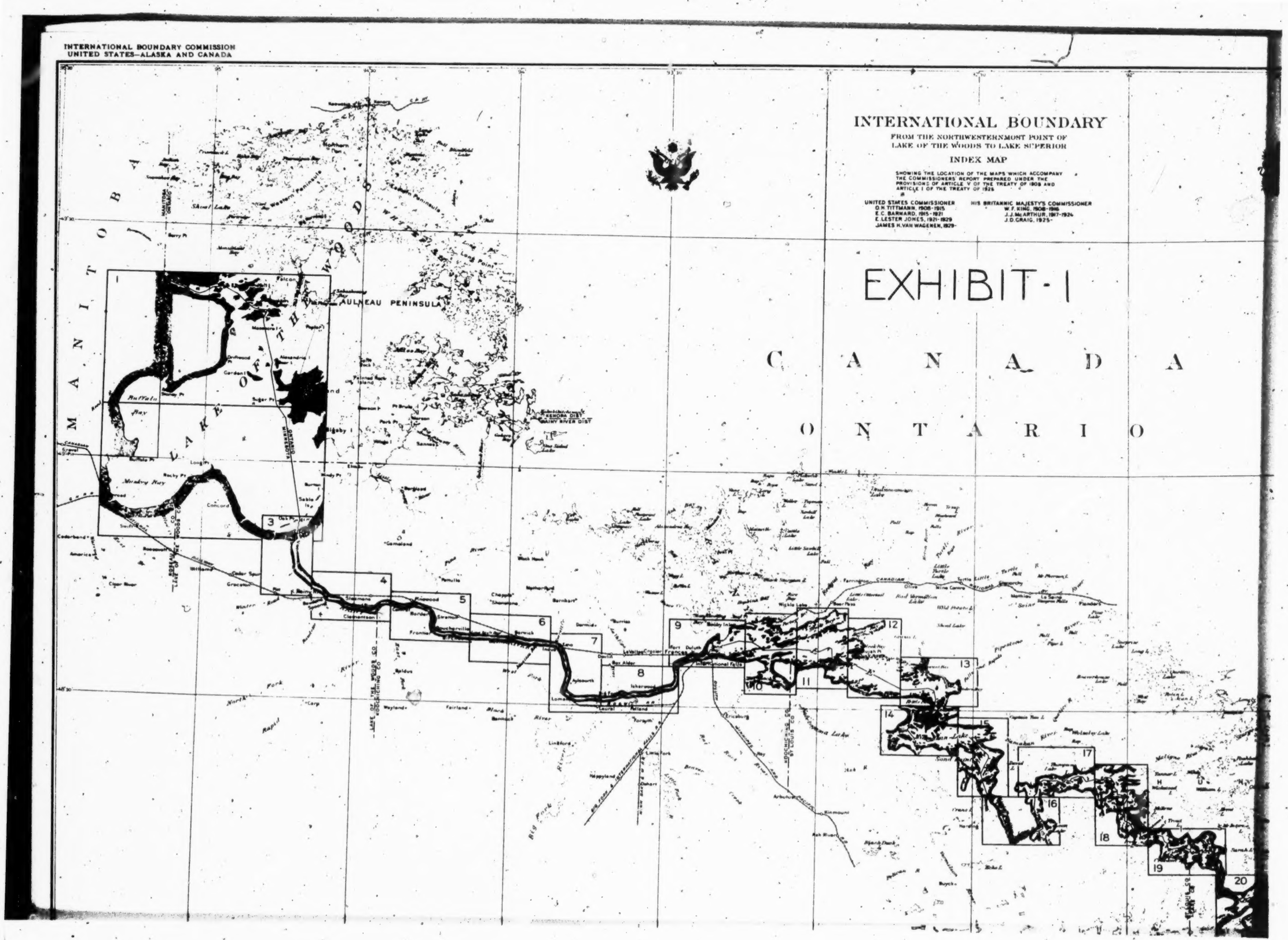
J. W. Craig
His Britannic Majesty's Commissioner

James Hawes Wagoner
United States Commissioner

SHEET NO. 29

Date of publication, 1929

INTERNATIONAL BOUNDARY COMMISSION
UNITED STATES—ALASKA AND CANADA



INTERNATIONAL BOUNDARY

FROM THE NORTHWESTERNMOST POINT OF
LAKE OF THE WOODS TO LAKE SUPERIOR

INDEX MAP

SHOWING THE LOCATION OF THE MAPS WHICH ACCOMPANY THE COMMISSIONERS' REPORT PREPARED UNDER THE PROVISIONS OF ARTICLE V OF THE TREATY OF 1908 AND ARTICLE I OF THE TREATY OF 1925

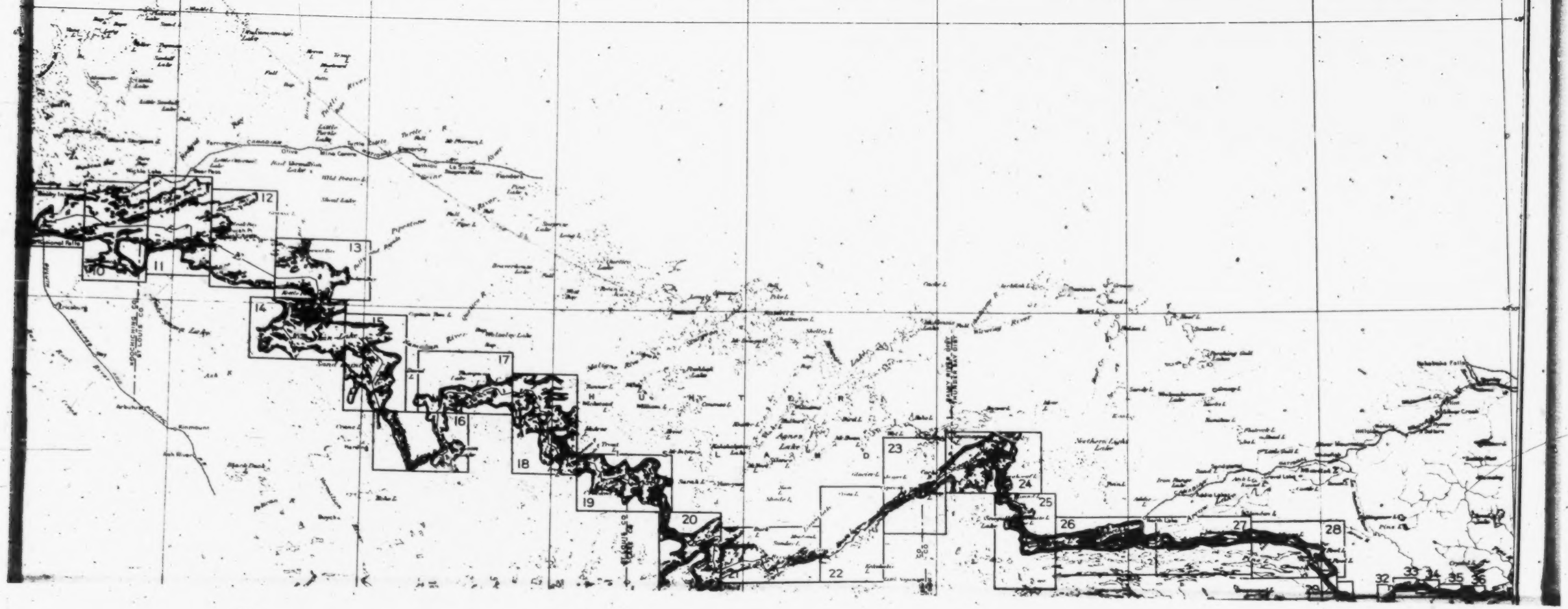
UNITED STATES COMMISSIONER
O.H. TITTMANN, 1908-1915
E.C. BARNARD, 1915-1921
E. LESTER JONES, 1921-1929
JAMES H. VAN WAGENEN, 1929-

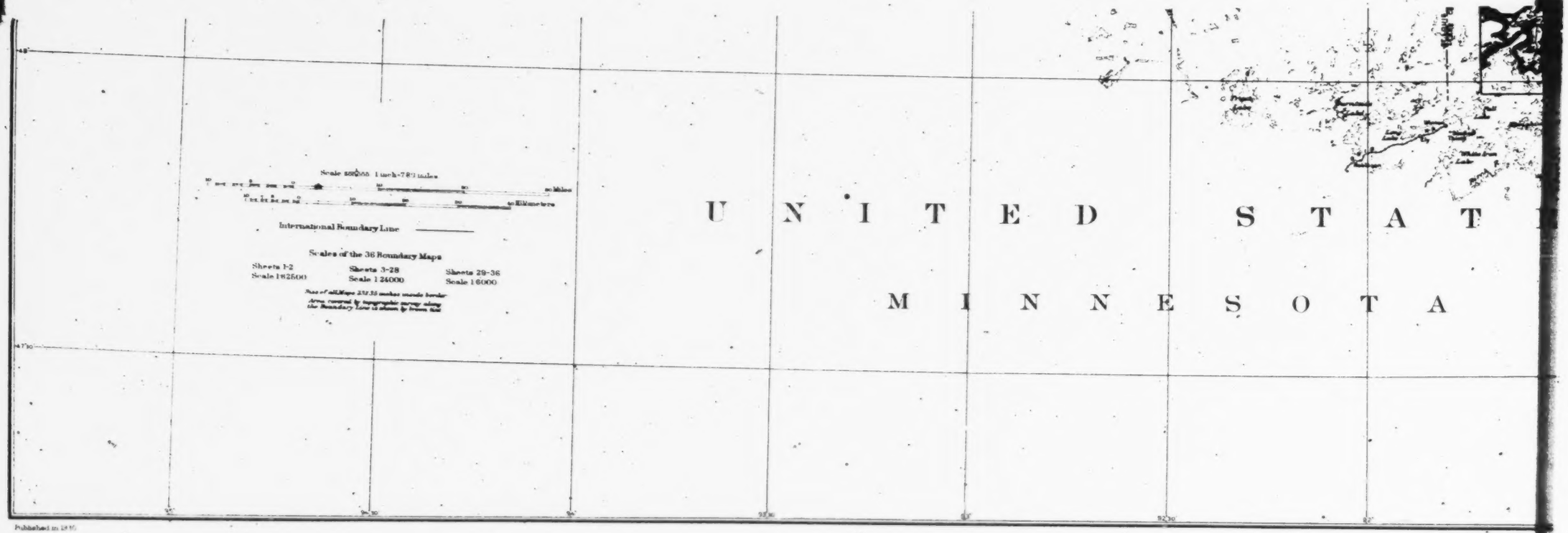
HIS BRITANNIC MAJESTY'S COMMISSIONER
W.F. KING, 1908-1946
J.J. McARTHUR, 1947-1924
J.D. CRAIG, 1925-

EXHIBIT-1

CANADA

ONTARIO




Scale 1:62500 1 inch=7.91 miles
International Boundary Line
Scales of the 36 Boundary Maps
Sheets 1-2
Scale 1:62500
Sheets 3-28
Scale 1:24000
Sheets 29-36
Scale 1:6000
UNITED STATES
MINNESOTA

I T E D S T A T E S
M I N N E S O T A
LAKE SUPERIOR
Grand Marais
22
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36

24 (Demurrer of Defendant to Amended Complaint.)

The defendant demurs to the amended complaint herein, on the grounds that the facts stated in said amended complaint do not constitute a cause of action.

Wherefore The defendant demands judgment for its costs and disbursements herein.

FRYBERGER, FULTON & BOYLE,
Attorneys for Defendant, 712-719 Lonsdale Building, Duluth, Minnesota.

Due and personal service of the within Demurrer is hereby admitted this 4th day of May, A. D. 1932,

JENSWOLD, JENSWOLD & DAHLE,
Attorneys for Plaintiff.

Endorsed: Filed May 4, 1932, Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

---

26 (Order Sustaining Demurrer to Amended Complaint; Judgment.)

(Filed in U. S. District Court on May 7, 1932.)

District Court of the United States, District of Minnesota, Fifth Division.

(Removed From District Court, Eleventh Judicial District, Cook County, Minnesota).

Pigeon River Improvement, Slide & Boom Company, Plaintiff,

vs.

Charles W. Cox, Limited, Defendant.

The above entitled action came on to be heard at the May, A. D. 1932 general term of the above named court on the demurrer of the defendant to the plaintiff's amended complaint herein, said demurrer being upon the ground that said amended complaint does not state facts sufficient to constitute a cause of action. Said demurrer was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed and it is hereby Ordered, Adjudged And Decreed, that said demurrer be and the same hereby is sustained, without leave to plaintiff to further amend said amended complaint, and that judgment be entered accord-

ingly. The plaintiff excepts to the ruling of the Court, and to the order of the Court, and the exception is allowed.

Dated May 4, 1932.

JOSEPH W. MOLYNEAUX,
United States District Judge.

Pursuant to the foregoing, it is Considered And Adjudged: That the above entitled cause be and the same hereby is dismissed and that the plaintiff's exception to the ruling of the court be and the same hereby is allowed.

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28 Assignment of Errors.

Comes now the Plaintiff-Appellant and files the following assignment of errors upon which it will rely in the prosecution of the appeal in this cause:

First—That the Court erred in sustaining Defendant's demurrer to Plaintiff's amended complaint.

Second—That the Court erred in ordering the entry of final judgment in favor of the Defendant.

Third—That the Court erred in rendering judgment dismissing said action upon the merits.

Wherefore, the Appellant prays that the decree herein be reversed by the United States Circuit Court of Appeals for the Eighth Circuit.

JENSWOLD, JENSWOLD & DAHLE,
Attorneys for Plaintiff-Appellant, Suite 703 Palladio Bldg., Duluth, Minnesota.

Endorsed: Filed May 7, 1932, Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

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29 Petition for Appeal.

The Plaintiff-Appellant, feeling itself aggrieved by the judgment of this Court entered on the 4th day of May, A. D. 1932, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, and prays that this appeal be allowed and that a transcript of the proceedings upon which said judgment was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated May 6, 1932.

JENSWOLD, JENSWOLD & DAHLE,
Attorneys for Plaintiff-Appellant, Suite 703 Palladio Bldg., Duluth, Minn.

Order Allowing Appeal.

Upon the foregoing petition of the Plaintiff-Appellant, Pigeon River Improvement, Slide & Boom Company, for an appeal and consideration of the assignment of errors presented therewith, it is

30 Ordered, that the appeal from the judgment herein be allowed as prayed for, and

Further Ordered, that a transcript of the proceedings and judgment herein, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated May 7, 1932.

JOSEPH W. MOLYNEAUX,
Judge, United States District Court.

Endorsed: Filed May 7, 1932, Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

31

Bond on Appeal.

Know All Men By These Presents: That Pigeon River Improvement, Slide & Boom Company, the above named appellant, as principal, and American Employers' Insurance Company, a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts and authorized to execute bonds in the State and District of Minnesota, as surety, are held and firmly bound unto Charles W. Cox, Limited, a corporation, the above named appellee, in the sum of Five Hundred Dollars ($500) lawful money of the United States of America, to the payment of which said principal binds itself, its successors and assigns, and said surety binds itself and its successors and assigns firmly by these presents.

The condition of this obligation is such that whereas on the 4th day of May, 1932, a judgment was entered in the above entitled action dismissing the amended complaint herein and said appellant feeling aggrieved thereby appeals therefrom to the United States Circuit Court of Appeals for the Eighth [District];

Now Therefore, if said appellant, Pigeon River Im-
32 provement, Slide & Boom Company, shall prosecute said appeal to effect and answer all damages and costs awarded against it if it fails to make its plea good, then this obligation to be void, otherwise to remain in full force and effect.

In Testimony Whereof, said principal has caused these presents to be executed by its proper officer and its corporate seal to be hereunto affixed, by authority of its Board of Directors, and said surety has caused these presents to be executed by its Attorney-in-Fact and its corporate seal to be hereunto affixed, by authority of its Board of Directors, this 5th day of May, 1932.

PIGEON RIVER IMPROVEMENT,
SLIDE & BOOM COMPANY,
By D. J. Arpin, President.
(Corporate Seal)

In Presence of:
Aurora Hanson
Ida C. Hammer
As to Principal

AMERICAN EMPLOYERS' INSURANCE COMPANY,
By L. M. McFarlane Its Attorney-in-Fact.
(Corporate Seal)

A. E. Olson
B. M. Andrew
As to Surety

State of Wisconsin,
County of Wood—ss.

On this 5th day of May, 1932, before me appeared D. J. Arpin, to me personally known, who being by me duly sworn, did say that he is the President of Pigeon River Improvement, Slide & Boom Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors, and said D. J. Arpin acknowledged said instrument to be the free act and deed of said corporation.

(Notarial Seal)

IDA C. HAMMER,
Notary Public, Wood Co. Wisconsin.

My Commission expires July 17, 1932.

33 State of Minnesota,
County of St. Louis—ss.

On this 6th day of May, 1932, before me appeared C. F. Liscomb, to me personally known, who being by me duly sworn, did say that he is the Attorney-in-Fact of American Employers' Insurance Company; that the seal affixed to the

foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors, and said C. F. Liscomb acknowledged said instrument to be the free act and deed of said corporation.

(Notarial Seal)

ALICE E. OLSON,
Notary Public, St. Louis County, Minn.

My Commission expires June 3, 1936.

Order Approving Bond.

The foregoing bond and the surety thereon are hereby approved, this 7th day of May, 1932.

JOSEPH W. MOLYNEAUX,
United States District Judge.

Endorsed: Filed May 7, 1932, Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

34

Citation.

District Court of the United States, District of Minnesota, Fifth Division.

(Removed From District Court, Eleventh Judicial District, Cook County, Minnesota).

Pigeon River Improvement, Slide & Boom Company, Plaintiff-Appellant,

vs.

Charles W. Cox, Limited, Defendant-Appellee.

To the Above Named Defendant and its Attorneys of Record, Messrs. Fryberger, Fulton & Boyle:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, on the 14th day of June, A. D., 1932, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the District of Minnesota, Fifth Division, wherein Pigeon River Improvement, Slide & Boom Company is Appellant, and you, the said Charles W. Cox, Limited, is Appellee, to show cause, if any there be, why the judgment rendered against the said Pigeon River Improvement, Slide & Boom Company, as in said ap-

peal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Given under my hand at the City of Duluth, in the District and Circuit above mentioned, this 7th day of May, A. D., 1932.

JOSEPH W. MOLYNEAUX,
Judge, United States District Court.

Service of the above Citation acknowledged this May 7, 1932.

FRYBERGER, FULTON & BOYLE,
Attorneys for Defendant-Appellee.

Endorsed: Filed in U. S. District Court on May 7, 1932.

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37 Stipulation as to Contents of Transcript and Approval Thereof.

It Is Hereby Stipulated And Agreed that the following, to-wit: Amended Complaint, together with Exhibits A to I, inclusive, on file herein and pleaded by reference in said amended complaint; Demurrer; Order Sustaining Demurrer and for Judgment; Judgment; Assignment of Errors; Petition for Allowance of Appeal and Order Allowing Appeal; Appeal Bond and Citation, are all of the files and records herein which are necessary to present the question involved in this cause to the Circuit Court of Appeals, and the Clerk may make a return to the Circuit Court of Appeals containing only copies thereof.

Dated May 6, 1932.

JENSWOLD, JENSWOLD & DAHLE,
Attorneys for Plaintiff-Appellant.

FRYBERGER, FULTON & BOYLE,
Attorneys for Defendant-Appellee.

37a Order.

Upon the foregoing stipulation, and upon all the files, records and proceedings herein, the Court being of the opinion that the papers referred to in said stipulation are all of the files and records herein which are necessary to present the questions involved in this cause to the Circuit Court of Appeals,

It Is Ordered, that the record on appeal shall contain copies of the following papers and no other, to-wit: Amended Complaint, together with Exhibits A to I, inclusive, on file herein and pleaded by reference in said Amended Complaint; Demurrer; Order Sustaining Demurrer and for Judgment; Judgment, Assignment of Errors; Petition for Allowance of Appeal and Order Allowing Appeal; Appeal Bond and Citation.

Dated May 7, 1932.

JOSEPH W. MOLYNEAUX,
Judge, United States District Court.

Endorsed: Filed May 7, 1932, Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

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38 (Amendment to Stipulation as to Contents of Transcript and Approval Thereof by District Judge.)

It Is Hereby Stipulated And Agreed that the petition for removal and the order for removal of the above case from District Court, Eleventh Judicial District, Cook County, Minnesota, to this Court, together with a recital by the Clerk of this Court that a proper bond for removal has been filed herein, shall be included in the return to the Circuit Court of Appeals herein, and that said papers, together with the additional papers described in the original stipulation herein are all of the files and records herein which are necessary to present the questions involved in this cause to the Circuit Court of Appeals and the Clerk may make a return to the Circuit Court of Appeals containing only copies thereof.

Dated June 8, 1932.

JENSWOLD, JENSWOLD & DAHLE,
Attorneys for Plaintiff-Appellant.

FRYBERGER, FULTON & BOYLE,
Attorneys for Defendant-Appellee.

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39 Order.

Upon the foregoing stipulation and upon all the files, records and proceedings herein, the Court being of the opinion that the papers referred to in said stipulation are files and records herein which are necessary to present the questions involved in this cause to the Circuit Court of Appeals,

It Is Ordered that the record on appeal shall contain copies of the papers described in the order dated May 6, 1932 herein and in addition thereto the petition for removal and order of removal of this cause from the District Court, Eleventh Judicial District, Cook County, Minnesota, to this Court, together with a recital by the Clerk that a proper bond for removal was filed herein, and no others.

Dated June 10, 1932.

JOSEPH W. MOLYNEAUX,
Judge, United States District Court.

Endorsed: Filed June 10, 1932, Joel M. Dickey, Clerk, By Catherine Neff, Deputy.

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41 Election as to Printing of Record.

The plaintiff-appellant hereby elects to have the record on appeal printed by, or under the direction of, the Clerk of the Circuit Court of Appeals.

Dated May 17, 1932.

JENSWOLD, JENSWOLD & DAHLE,
Attorneys for Plaintiff-Appellant,
Suite 703 Palladio Building, Duluth,
Minnesota.

Endorsed: Filed May 17, 1932, Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

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42 (Clerk's Certificate to Transcript.)

United States District Court, District of Minnesota,
Fifth Division.

I, Joel M. Dickey, Clerk of said District Court, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing consisting of 41 pages, numbered consecutively from 1 to 41 inclusive, is a true and complete transcript of all the records, process, pleadings, orders and final judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court and in accordance with the stipulations of the parties for such transcript, copies of which are included within said paging; and I do further certify and return that I have annexed to said transcript and included within said paging the

original citation, together with the admission of service thereof.

Seal
U. S. Dist. Court
Fifth Division
Dist. of Minnesota

In Testimony Whereof, I have hereunto set my hand as the Clerk aforesaid and affixed the seal of said court at Duluth, in the District of Minnesota, this 11th day of June, A. D., 1932.

JOEL M. DICKEY, Clerk.
By E. Catherine Neff, Deputy.

Filed Jun. 18, 1932, E. E. Koch, Clerk.

Appearances of counsel omitted in printing.

Minute entry of argument and submission, Nov. 30, 1932, omitted in printing.

In United States Circuit Court of Appeals, Eighth Circuit, November Term, A. D. 1932

No. 9547

Pigeon River Improvement, Slide & Boom Company, Appellant,

vs.

Charles W. Cox, Limited, Appellee

Appeal from the District Court of the United States for the District of Minnesota

Mr. John D. Jenswold (Messrs. Jenswold, Jenswold & Dahle were with him on the brief) for appellant.

Mr. Edward L. Boyle (Messrs. Fryberger, Fulton & Boyle were with him on the brief) for appellee.

Before Kenyon, Gardner and Sanborn, Circuit Judges

Opinion—Filed Feb. 16, 1933

Kenyon, Circuit Judge, delivered the opinion of the Court:

Appellant is a corporation organized under and authorized by the laws of Minnesota as a slide and boom company to construct dams and sluiceways and other improvements along the channel on the Minnesota side of the Pigeon River. The Pigeon River is, by the terms of the Webster-Ashburton Treaty of 1842, made part of the international boundary line between the United States and Canada. It is a small stream between the northeast corner of Minnesota and the Province of Ontario, and flows a distance of

about thirty miles into Pigeon Bay on Lake Superior. Appellee is a Canadian timber dealer and floats timber cut from Canadian lands down the Arrow River in Canada into the Pigeon River enroute to Lake Superior. In 1928, 1929 and 1930 appellee drove quantities of pulpwood and railway ties down the Pigeon River, and in so doing made use of appellant's improvements, refusing to pay tolls thereon. Appellant brought this action in the State Court for their collection. It was removed to the United States District Court. An amended complaint was filed. Appellee demurred on the ground that the facts stated were not sufficient to constitute a cause of action. The Court sustained the demurrer without leave to amend and entered judgment of dismissal. This appeal followed.

The case involves the construction of that part of Article II of the Webster-Ashburton Treaty of August 9, 1842, 8 U. S. Stat. L. 572, which reads as follows: "That all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

All of appellant's improvements and works with the exception of a certain flooding dam lie in the portion of the river between Fort Charlotte and its mouth.

It is appellant's contention (1) that the Pigeon River from its mouth to Fort Charlotte is not "a water communication" within the meaning of this provision of the treaty, and that it was not "actually used" as such at the time of the treaty or at any time before that, and that therefore the provisions of the treaty do not apply to that part of the river where appellant's improvements are located; (2) that the words "free and open" as used in the treaty do not imply freedom from tolls or charges for the use of improvements in aid of the flotation of logs.

Appellee's claims are: that the Pigeon River from shore to shore was made a boundary water by the Webster-Ashburton Treaty; that it is one of the water communications between Lake Superior and Lake of the Woods referred to in said treaty; that the movement of Canadian wood on the Pigeon River is foreign commerce, over which the State of Minnesota has no control, and that said State has no authority to grant the right to appellant to collect tolls on the

Pigeon River; that such collection is in violation of the Webster-Ashburton Treaty.

This case is a companion one to Clark v. Pigeon River Improvement Slide & Boom Co., (C. C. A. 8), 52 F. (2d) 550, and the essential facts are the same in the two cases. Some of the questions here were also involved in Rainy Lake River Boom Corp. v. Rainy River Lumber Co., Ltd., (C. C. A. 8) 162 F. 287.

In the Clark case we considered that provisions of the Webster-Ashburton Treaty involved here, and went into the matter rather thoroughly, consulting the diplomatic correspondence between the authors of this treaty in order to throw light on the meaning of the terms employed. Our conclusion in the Clark case was against the theory advanced by appellant in this case, and we held that the movement of Canadian pulpwood on the Pigeon River was foreign commerce over which the State of Minnesota could exercise no control, and that the collection of tolls on this river under grant of a franchise by the State of Minnesota would be a violation of the Webster-Ashburton Treaty.

Nothing new is presented here, except possibly some additional correspondence between the parties to the treaty, and this further situation: In our opinion in the Clark case we quoted from the Canadian court in the case of Arrow River and Tributaries Slide and Boom Co., Ltd., 39 Ont. Weekly Notes 434, 66 Ontario Law Reports, 577, where the Canadian court had held that under the Webster-Ashburton Treaty the Pigeon River was to be "free and open" for the nationals of the two contracting parties, and that meant the Slide and Boom Company there had no right to build upon the bed of the Pigeon River anything which would interfere with the enjoyment of free and open use of it by the citizens of the United States, and held against the alleged right to fix any tolls upon the use of the Pigeon River. This case was appealed to the Supreme Court of the Dominion of Canada, and after our decision in the Clark case that court on March 15, 1932, reversed the provincial Supreme Court, and held that the treaty did not forbid the collection of tolls for the use of the Arrow River Company's improvements in the river. So a rather unusual situation is presented and a seeming conflict between our decision and that of the highest Canadian appellate court. Some of the Judges in the Canadian appel-

late court agreed with certain parts of our construction of the treaty, and while the Judges reversed the case they are not at all in harmony as to the meaning of certain of the phrases used in the article in question.

It was frankly conceded in argument that unless this court was willing to reverse its decision in the Clark case appellant was not entitled to a reversel of the judgment of the federal court. In the printed argument of counsel for appellant it is stated that our decision was largely based upon the decision in the Canadian court. That statement is not entirely accurate, as we construed the provisions of Article II of the treaty in question in the way we thought they should be construed in the light of the diplomatic correspondence and the language of the provisions. We cited the decision in the Arrow River and Tributaries Slide and Boom Co., Ltd., case, as in line with our conclusion, but we did not base our decision entirely upon that case. If the question were now an original one we should feel that in view of the conflicting decisions as to the construction of this treaty it would be proper to certify the questions to the Supreme Court for advice, but as we have in the Clark case expressed our opinion as to how these provisions should be construed we would not we think be warranted in asking the advice of the Supreme Court in relation thereto, unless satisfied at least that our former decision was erroneous. We are not so satisfied. In view of the holdings of this Court in the Clark case, supra, and the Rainy Lake River Boom Corp. v. Rainy River Lumber Co., Ltd., supra, the demurrer to the amended complaint in this case was properly sustained and the judgment of the trial court is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 9547

PIGEON RIVER IMPROVEMENT, SLIDE AND BOOM COMPANY, Appellant,

vs.

CHARLES W. COX, LIMITED

Appeal from the District Court of the United States for the District of Minnesota

JUDGMENT—February 17, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Charles W. Cox, Limited, have and recover against the Pigeon River Improvement, Slide and Boom Company the sum of Twenty Dollars for its costs herein and have execution therefor.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR APPEAL TO SUPREME COURT U. S.—Filed May 12, 1933

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Your petitioner, Pigeon River Improvement, Slide & Boom Company, a Minnesota corporation, respectfully shows:

1. That petitioner is the appellant in the above entitled cause.

2. That the appeal in said cause was from a final judgment of dismissal rendered on the 4th day of May, 1932, by the United States District Court for the District of Minnesota, Fifth Division, in an action for the recovery of money only, wherein petitioner was plaintiff and appellee herein, defendant.

3. That on appeal from said judgment to this Court, said judgment was in all respects affirmed, with costs, by

the final judgment of this Court entered herein on February 17, 1933.

4. That the case is one in which, under the legislation in force when the Act of January 31, 1928 was passed, a review could be had in the Supreme Court of the United States on writ of error. That the validity of a statute of the State of Minnesota, to-wit: Chapter 224, General Laws of Minnesota for the year 1889, as amended by Chapter 89, General Laws of Minnesota for the year 1905, is drawn in question in this case and the judgment of the said District Court and the judgment and decision of this Court on appeal therefrom is against the validity of such statute, on the ground of its being repugnant to the Constitution and Treaties of the United States, to-wit: Section 8 of Article 1 of the Constitution of the United States, and Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572.

5. That the errors upon which petitioner claims to be entitled to appeal are as set forth in an assignment of errors filed herewith, and petitioner presents and files herewith a separate typewritten statement particularly disclosing the basis upon which petitioner contends that the Supreme Court of the United States has jurisdiction, upon appeal, to review the said judgment and decision. That your petitioner is aggrieved by the said judgment and decision of this Court and therefore prays for the allowance of an appeal therefrom to the Supreme Court of the United States, in order that said decision and judgment may be examined and reversed; that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of this Court, may be sent to the Supreme Court of the United States, as provided by law; that proper security for costs be fixed and taken and that the required citation to appellee be signed and issued herein.

Dated May 11, 1933.

Pigeon River Improvement, Slide & Boom Company, by John D. Jenswold, Attorney for Petitioner, Appellant, Suite 703 Palladio Building, Duluth, Minnesota. Jenswold, Jenswold & Dahle, of Counsel, Suite 703 Palladio Building, Duluth, Minnesota.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Assignments of Error on Appeal to Supreme Court, U. S.—Filed May 12, 1933

Comes now Pigeon River Improvement, Slide & Boom Company, the appellant above named, and as appellant to the Supreme Court of the United States from the judgment and decision of this Court entered herein on February 17, 1933, assigns as error that this, the Circuit Court of Appeals of the United States for the Eighth Circuit, erred in its said judgment and decision in particulars as follows, to-wit:

1. In refusing to reverse the judgment of the United States District Court for the District of Minnesota, Fifth Division.

2. In holding that Chapter 221, General Laws of Minnesota for the year 1889, as amended by Chapter 89, General Laws of Minnesota for the year 1905, is invalid by reason of its being repugnant to Section 8 of Article I of the Constitution of the United States.

3. In holding that Chapter 221, General Laws of Minnesota for the year 1889, as amended by Chapter 89, General Laws of Minnesota for the year 1905, is invalid, by reason of its being repugnant to Article II of the Webster-Ashburton Treaty of August 22, 1842; 8 United States Statutes at Large 572.

4. In holding that Section 8 of Article I of the Constitution of the United States prevents appellant from collecting reasonable and uniform tolls upon logs and timber driven, sluiced and floated by appellee upon the portion of Pigeon River within the boundaries of the State of Minnesota for the use by appellee in such operation of appellant's works, constructed, repaired, maintained and operated by it within the boundaries of the State of Minnesota in aid of driving logs thereon, pursuant to permission conferred by appellant's charter from the State of Minnesota pursuant to Chapter 221, General Laws of Minnesota for the year 1889, as amended by Chapter 89, General Laws of Minnesota for the year 1905.

5. In holding that Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at

Large 572, prevents appellant from collecting reasonable and uniform tolls upon logs and timber driven, sluiced and floated by appellee upon the portion of Pigeon River within the boundaries of the State of Minnesota for the use by appellee in such operation of appellant's works constructed, repaired, maintained and operated by it within the boundaries of the State of Minnesota in aid of driving logs thereon pursuant to permission conferred by appellant's charter from the State of Minnesota pursuant to Chapter 221, General Laws of Minnesota for the year 1889, as amended by Chapter 89, General Laws of Minnesota for the year 1905.

6. In refusing to hold that that portion of Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572, reading: "That all the water-communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also Grand Portage, from the Shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries," does not apply to the portions of Pigeon River lying between South Fowl Lake and the mouth of Pigeon River where appellant's works in aid of driving logs thereon are situate.

7. In refusing to hold that that portion of Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572, reading: "That all the water-communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also Grand Portage, from the Shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries," does not apply to the portions of Pigeon River between Fort Charlotte and the mouth of Pigeon River where appellant's works in aid of driving logs thereon are situate.

8. In holding that the words "free and open," as used in Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572, apply to and forbid the collection of reasonable and uniform tolls upon logs and timber driven, sluiced and floated upon Pigeon River for the use by appellee in such operation of works constructed, repaired, maintained and operated by appel-

lant in aid of driving logs in the portion of Pigeon River within the boundaries of the State of Minnesota, under permission conferred by its charter from the State of Minnesota, pursuant to Chapter 221, General Laws of Minnesota for the year 1889, as amended by Chapter 89, General Laws of Minnesota for the year 1905.

9. In holding that the movement by a Canadian citizen of logs and timber on the portion of Pigeon River within the boundaries of the State of Minnesota is foreign commerce within the meaning of Section 8 of Article I of the Constitution of the United States, over which the State of Minnesota cannot exercise control to the extent of chartering appellant, pursuant to Chapter 221, General Laws of Minnesota for the year 1889, as amended by Chapter 89, General Laws of Minnesota for the year 1905, to construct, repair, maintain and operate works in aid of driving logs in the portion of Pigeon River within the boundaries of the State of Minnesota, and to collect reasonable and uniform tolls thereon for the use in such operation of such works.

For which errors the appellant, Pigeon River Improvement, Slide & Boom Company prays that the said judgment and decision of the Circuit Court of Appeals of the United States for the Eighth Circuit, dated February 17, 1933, in the above entitled cause, be reversed, and that appellant be restored to all things that it has lost by reason thereof, with costs to appellant.

Dated May 11, 1933.

John D. Jenswold, Attorney for Appellant, Suite 703 Palladio Building, Duluth, Minnesota. Jenswold, Jenswold & Dahle, of Counsel, Suite 703 Palladio Bldg., Duluth, Minn.

[File endorsement omitted.]

Bond on appeal for $500.00, approved and filed May 12, 1933, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING APPEAL—Filed May 12, 1933

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment and decision

made and entered in the above entitled suit in the Circuit Court of Appeals of the United States for the Eighth Circuit on February 17, 1933, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review said judgment and decision, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered, that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Circuit Court of Appeals of the United States for the Eighth Circuit, in the above entitled cause, as provided by law, and it is further ordered, that the Clerk of the Circuit Court of Appeals of the United States for the Eighth Circuit shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty (30) days of this date.

And it is further ordered, that security for costs on appeal be fixed in the sum of $500.00.

Dated at St. Paul, Minnesota, this 12 day of May, 1933.

Kimbrough Stone, Judge Circuit Court of Appeals of the United States for the Eighth Circuit.

[File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS

PROOF OF SERVICE OF PETITION FOR APPEAL, ETC.—Filed May 18, 1933

STATE OF MINNESOTA,
County of St. Louis, ss:

John D. Jenswold, being duly sworn upon oath, deposes and says that at the City of Duluth, State of Minnesota, in the above Circuit, on May 16, 1933, affiant served upon Edward L. Boyle, the attorney for the appellee herein, the following, to-wit: Petition for appeal to the Supreme Court of the United States; Order allowing said appeal;

Assignments of error; Jurisdictional statement required by Paragraph 1, Rule 12 of the Supreme Court, and Statement directing attention to Paragraph 3 of Rule 12 of the Supreme Court, by then and there handing to and leaving with him true and correct copies thereof.

John D. Jenswold.

Subscribed and sworn to before me this 16th day of May, 1933. My commission expires Jan. 13, 1940. Ruth G. Johnson, Notary Public, St. Louis County, Minn. (Seal.)

Citation, in usual form, showing service on Edward L. Boyle et al., filed May 18, 1933, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 19, 1933

The Clerk will please prepare a transcript of a record to be filed in the office of the Clerk of the Supreme Court of the United States, including therein the following:

1. The printed record in the Circuit Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the Court.
4. Judgment or decree.
5. Petition for appeal.
6. Undertaking on appeal.
7. Order allowing appeal.
8. Assignments of error.
9. Jurisdictional statement.
10. Proof of service of petition for appeal, order allowing appeal, assignments of error, jurisdictional statement and statement calling attention to Paragraph 3, Rule 12 of the Supreme Court.
11. Citation and proof of service thereof.
12. Præcipe.
13. Clerk's certificate.

Dated May 17, 1933.

John D. Jenswold, Attorney for Appellant, Suite 703 Palladio Bldg., Duluth, Minn. Jenswold, Jenswold & Dahle, of Counsel, Suite 703 Palladio Bldg., Duluth, Minn.

Due and personal service of the within præcipe is hereby admitted by receipt of copy thereof at Duluth, Minn., this 17th day of May, 1933.

Edward L. Boyle, Attorney for Appellee. Fryberger, Fulton & Boyle, of Counsel for Appellee.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein the Pigeon River Improvement, Slide and Boom Company was Appellant and Charles W. Cox, Limited, was Appellee, No. 9547, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the twenty-second day of March, A. D. 1933, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the City of St. Louis, Missouri, this twentieth day of May, A. D. 1933.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF PRINTED RECORD —Filed June 12, 1933

Now comes the above named appellant, pursuant to paragraph 9 of Rule 13 of the Rules of this Court, and states that the points upon which it intends to rely in this Court in this case are as follows:

I. Appellant has in its amended complaint stated facts sufficient to constitute a cause of action against appellee, based upon rights conferred upon it by statutes of the State of Minnesota.

II. These statutes are not invalid for repugnancy to Article II of the Webster-Ashburton Treaty of August 22, 1842.

III. These statutes are not invalid for repugnancy to Section 8 of Article I of the Constitution of the United States.

IV. The Courts below have, in substance and effect, denied the validity of such statutes of the State of Minnesota.

The appellant further represents that the whole of the record as filed is necessary for the consideration of the case, except the jurisdictional statement, and except that the bond and citation upon this appeal need not be printed in full in the record, but simply noted.

John D. Jenswold, Suite 703 Palladio Building, Duluth, Minnesota, and Bernard R. Goggins, Wisconsin Rapids, Wisconsin, Attorneys for Appellant.

Due and personal service of the within Statement, etc., is hereby admitted, by receipt of copy thereof at Duluth, Minn., this 7th day of June, 1933.

Edward L. Boyle, Attorney for Appellee. Fryberger, Fullon, Boyle, of Counsel for Appellee.

[File endorsement omitted.]

Endorsed on cover: File No. 37,729. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 126. Pigeon River Improvement, Slide & Boom Company, appellant, vs. Charles W. Cox, Limited. Filed June 5, 1933. File No. 126, O. T. 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 126

PIGEON RIVER IMPROVEMENT, SLIDE & BOOM COMPANY, APPELLANT,

vs.

CHARLES W. COX, LIMITED.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

JURISDICTIONAL STATEMENT.

The appellant, Pigeon River Improvement, Slide & Boom Company, in support of the jurisdiction of the Supreme Court of the United States to review, upon appeal, the judgment and decision of this Court in the above entitled cause, respectfully represents:

I.

Statutory Provision Sustaining Jurisdiction.

"Any case in a Circuit Court of Appeals where is drawn in question the validity of a

statute of any State, on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States, and the decision is against its validity, may, at the election of the party relying on such state statute, be taken to the Supreme Court, for review on writ of error or appeal; * * * and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case." 28 U. S. C. 347(*b*).

II.

Statute of State the Validity of Which is Involved.

The statute of the State of Minnesota, the validity of which is here involved, is Chapter 221, General Laws of Minnesota for the year 1889, as amended by Chapter 89, General Laws of Minnesota for the year 1905, which, summarizing its pertinent provisions, provides, among other things:

That any corporation formed thereunder may take prior possession of any stream by the construction of works in aid of driving logs thereon and may improve such stream by clearing and straightening channels, closing sloughs, and by building sluiceways, booms, side, rolling, sluicing and flooding dams: That any such company which shall so improve a stream and keep in repair and operate its works as to render the driving of logs therein reasonably practicable may collect reasonable and uniform tolls upon all logs and timber driven, sluiced or floated thereon. That any such corporation organized for the improvement of any stream forming wholly or in part the boundary

line between Minnesota and an adjoining state or country may unite with any similar corporation formed under the laws of such adjoining state or country for the better accomplishment of the purposes of its organization either by ownership of stock therein, consolidation therewith, or otherwise. That such corporation may acquire necessary rights by purchase or eminent domain, and that such corporation is a public service corporation to the extent that it must serve the public equally and reasonably and for reasonable compensation.

III.

Date of Judgment and of Application for Appeal.

The judgment and decision of the Circuit Court of Appeals of the United States for the Eighth Circuit which is sought to be reviewed was entered on February 17, 1933.

Application for appeal is dated May 11, 1933, and was presented on May 12, 1933.

IV.

Nature of Case and Ruling of Court.

The above appellant in an amended complaint sued at law for $8,566.44, alleging that amount to be its reasonable and uniform tolls to which it is entitled for the use by appellee of works constructed and maintained by it in portion of Pigeon River lying within the State of Minnesota so as to make the driving of logs and timber therein reasonably practicable. The complaint further alleges that appellant was incorporated on September 3, 1898, pursuant to the above

statute and to a charter given it by the State of Minnesota expressly authorizing it to exercise rights under said statutes on the portion of Pigeon River lying on the Minnesota side of the international boundary which traverses the river at approximate midstream; that at that time no other corporation had been formed for such purpose and appellant therefore took prior possession of the American side of the river and improved it by clearing and straightening channels, closing sloughs and constructing sluiceways, booms, side, rolling, sluicing and flooding dams; at the same time another corporation, Arrow River & Tributaries Boom & Slide Company, was chartered under the laws of the Province of Ontario with similar purposes and powers on the Canadian side of the river. The two companies, acting together, constructed their works and made their improvements so that those of each constituted complements of those of the other by joint action pursuant to agreement between them, they having each ever since kept their improvements in repair and so operated their respective works on the river as to render the driving of logs and timber therein reasonably practicable. The complaint further alleges that in the Spring of 1928 appellee owned a large quantity of logs and timber which it put into the river at the point where Arrow River empties into it and drove the same downstream to the river's mouth, making use and securing the benefit of appellant's improvements in so doing. In the Spring of 1929 and again in the Spring of 1930, appellee made similar drives and it is the tolls for these three drives which are sought to be recovered.

The case, being pending in the District Court of the United States for the District of Minnesota, Fifth Division, appellee demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The lower court sustained the demurrer and entered a final judgment of dismissal.

The appellant thereupon appealed to this Court, which, on February 17, 1933, entered its decision and judgment sustaining the lower court.

The ruling and holding of this Court was:

(*a*) That the Statutes above quoted are invalid by reason of their repugnancy to the Commerce Clause, Section 8 of Article I of the Constitution of the United States.

(*b*) That said statutes are invalid by reason of their repugnancy to Article II of the Webster-Ashburton Treaty of August 22, 1842.

(*c*) That the Commerce Clause of the Constitution of the United States has the effect of preventing appellant from collecting tolls under the facts as alleged in the complaint for appellee's use of appellant's works, notwithstanding that they are located wholly within the boundaries of the State of Minnesota and are constructed and maintained and the right to collect such tolls is expressly conferred upon appellant by its charter from the State of Minnesota, pursuant to the above mentioned statutes.

(*d*) That Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes

at Large 572, prevents appellant from collecting tolls under the facts as alleged in the complaint for appellee's use of appellant's works, notwithstanding that they are located wholly within the boundaries of the State of Minnesota and are constructed and maintained and the right to collect such tolls is expressly conferred upon appellant by its charter from the State of Minnesota, pursuant to the above mentioned statutes.

(*e*) That that portion of Article II of the Webster-Ashburton Treaty providing that all the water-communications and usual portages along the boundary from Lake Superior to Lake of the Woods and Grand Portage from Lake Superior to Pigeon River "as now actually used" shall be free and open to the use of the citizens and subjects of both countries, applies to the portion of Pigeon River wherein appellant's works are situated, it being appellant's claim that those portions of the river were not at the time of the making of the Treaty "water-communications" nor "actually used," nor had they ever been, and that the clause of the Treaty in question does not apply to such portions of the river, the Court further holding that that clause so applied prevented the relief sought in the action.

(*f*) That the words "free and open" as used in that clause of the Treaty had the effect of preventing the collection of tolls and the relief sought in the action, it being appellant's claim that the phrase "free and open" meant simply "common to the citizens and subjects of both countries," or "open to the use and en-

joyment of the citizens of both countries on equal terms''; in other words, without discriminatory tolls or charges against the citizens of either.

(*g*) That the movement by a Canadian citizen of Canadian pulpwood on Pigeon River was foreign commerce, over which the State of Minnesota could not exercise control to the extent above mentioned, it being appellant's claim that there was no question of interference with foreign commerce under the allegations of the complaint.

V.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction on appeal to the Supreme Court of the United States.

Williams v. *Norris*, 12 Wheat. 117.

American Sugar Refining Co. v. *New Orleans*, 181 U. S. 277.

Zucht v. *King*, 260 U. S. 174.

Atlantic Coast Line Ry. Co. v. *Goldsboro*, 232 U. S. 548.

Arkadelphia Milling Co. v. *St. Louis Southwestern Railway Co.*, 249 U. S. 134.

Wilson v. *Blackbird Creek Marsh Co.*, 2 Pet. 251.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal, by virtue of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (now Section 374*b* of Title 28 of the United States Code (28 U. S. C.

374*b*)), and as further amended or modified by the Act of January 31, 1928, and the Act of April 26, 1928 (28 U. S. C. 861*a*, 861*b*).

Dated May 11, 1933.

Respectfully submitted,

JOHN D. JENSWOLD,
Attorney for Appellant,
Suite 703 Palladio Bldg., Duluth, Minn.

JENSWOLD, JENSWOLD & DAHLE,
Of Counsel,
Suite 703 Palladio Bldg.,
Duluth, Minn.

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FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 126.

PIGEON RIVER IMPROVEMENT, SLIDE & BOOM COMPANY,
Appellant,

vs.

CHARLES W. COX, LIMITED,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANT'S BRIEF.

JOHN D. JENSWOLD,
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Duluth, Minnesota,
BERNARD R. GOGGINS,
Wisconsin Rapids, Wisconsin,
Attorneys for Appellant.

JENSWOLD, JENSWOLD & DAHLE,
Duluth, Minnesota,
Of Counsel for Appellant.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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HISTORICAL REFERENCES.

Congressional Record, 56th Congress, Second Session, page 3462 .. 26
History of Grand Portage, Minnesota History Bulletin, Vol. 5, p. 14 19
Manuscript Journals of Alexander Henry and David Thompson, Elliott Coues, New York (1897), Vol. 1, p. 6 42
Senate Documents, Third Session, 27th Congress, Vol. 1 .... 19, 45, 62
Topography and Geology of the Grand Portage, Minnesota History Bulletin, Vol. 9, p. 27 18
Voyages from Montreal on the River St: Lawrence Through the Continent of North America to the Frozen and Pacific Oceans, Sir Alex. McKenzie, London, 1801 19
Wisconsin Historical Collections, Vol. XI (1888), p. 123 42

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 126.

PIGEON RIVER IMPROVEMENT, SLIDE & BOOM COMPANY,
Appellant,

vs.

CHARLES W. COX, LIMITED,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

APPELLANT'S BRIEF.

STATEMENT OF CASE.

The decision below is reported at 63 Fed. (2d) 567.

Appellant, in 1898, was by Minnesota statutes and its incorporation thereunder and by an Act of Congress of 1901, authorized to construct and operate dams and sluiceways and to otherwise improve the channel on the American side of the International Boundary in Pigeon River, a non-navigable boundary stream some thirty miles long, flowing into Lake Superior at the northeast corner of Minnesota, so as to make possible the driving of logs therein, and to collect reasonable and uniform tolls or charges on timber

driven down the river for the use of such facilities provided and maintained by it.

An affiliated company was at the same time chartered and similarly authorized by the Province of Ontario to operate on the Canadian side of the boundary. The two companies, pursuant to agreement between them, then improved the river and have since maintained their improvements, each on its own side of the boundary, so that, although in its natural state the river was incapable of use for log driving, it has ever since been capable of such use.

Appellee, a Canadian citizen, during the year 1928 to 1930, drove and floated considerable quantities of loose pulpwood and railway ties of Canadian origin down the river, making use of appellant's improvements on the American side of the boundary in so doing (R. 7). It refused to pay appellant's charges therefor. This action for their collection, brought in the Minnesota State District Court, followed.

The action was duly removed to the United States District Court for Minnesota (R. 1-5).

An amended complaint was then filed (R. 5). Appellee demurred on the ground that it did not state facts sufficient to constitute a cause of action (R. 29). The demurrer was sustained, without leave to amend, and a judgment of dismissal was entered (R. 29-30).

Appellant appealed to the Circuit Court of Appeals, Eighth Circuit, who affirmed.

The case is here on appeal. A jurisdictional statement was filed and jurisdiction has been noted.

STATEMENT OF FACTS.

The allegations of the complaint must here be taken as true and capable of proof. These, together with geographical and historical facts, the state statute and the Federal statute authorizing appellant's acts follow.

Appellant's Authority Under Minnesota Laws.

Par. 2633-4, Title I, chap. 34, General Statutes, Minnesota, 1894, enacted as chap. 221, General Laws of Minnesota, 1889, authorizes appellant's acts (R. 5-6). The statute was amended by chap. 89, General Laws of Minnesota for 1905 and appears as Par. 7550-2, *Mason's Minnesota Statutes, 1927*. The full text of the original act is printed in an appendix to this brief. So far as here pertinent, it provides:

1. The company may "take prior possession of any stream by the construction of works in aid of driving logs thereon and may improve such stream by clearing and straightening channels, closing sloughs and by building sluiceways, booms, side, rolling, sluicing and flooding dams. * * *"

2. Any such company which "shall so improve a stream, keep it in repair and operate its works as to render the driving of logs therein reasonably practicable, may collect reasonable and uniform tolls upon all logs, lumber and timber, driven, sluiced or floated thereon."

3. "Any such company organized for the improvement of any stream forming either wholly or in part the boundary line between Minnesota and an adjoining state or country, may unite with any similar corporation formed under the laws of such adjoining state or country for the better accomplishment of the purposes of its organization, either by

ownership of stock therein, consolidation therewith, or otherwise."

4. "Necessary rights may be acquired by purchase or eminent domain."

5. "Such company is a public service company to the extent that it must serve the public equally and reasonably and for reasonable compensation."

Appellant was incorporated on September 3, 1898, as a Minnesota corporation for the express purpose of exercising the franchise conferred by this statute on the portion of Pigeon River lying on the American side of the boundary. Its certificate of incorporation authorizes it so to do (R. 5-6).

Pigeon River is a small stream having its source in some small boundary lakes and flowing in a southeasterly direction a distance of about thirty miles along and forming the boundary between the United States and Canada. It discharges into Lake Superior. The boundary is approximately in midstream (R. 6).

Detailed sectional maps of the river from Lake Superior to South Fowl Lake, prepared under the direction of the International Joint Boundary Commission, are, by reference, made a part of the amended complaint as Exhibits A to H (R. 5, 11-25). A detailed map showing the entire boundary and boundary waters from Lake Superior to Lake of the Woods and the northwest angle of Minnesota is pleaded as Exhibit I (R. 27). Smaller reproductions of these maps are incorporated in the record, but unfortunately because of difficulty of reproduction on a small scale, they are not as clear and understandable as the original exhibits themselves.

Before appellant's incorporation and the improvements of the river by the two companies, it was incapable of use for

the driving, handling and floating of logs, pulpwood and timber of other sorts thereon (R. 6).

No other company had then been organized for the improvement of the river; hence, appellant "took prior possession" of the American side of the river pursuant to state statutes, and thus became vested with the franchise and privileges thereby conferred (R. 6).

Appellant's Authority Under Federal Law.

The boundaries of the Pigeon River Indian Reservation touching the river are shown on the maps. The Reservation extends along the Minnesota side of the river from a point shown on Exhibit F (R. 21) downstream to a point shown on Exhibit B (R. 13), about fifteen miles by the river.

Act of Congress, March 3, 1901 (31 Stat. 1455), the full text of which is printed in the appendix, authorized appellant to enter upon this Reservation and improve the river at its cascades for the purpose of making it navigable for floating logs and to construct sluice dams, wing dams, bulkheads, spill dams and other works necessary for that purpose, upon condition that after being so improved the river should be open to the free passage of timber cut from the Reservation and to the passage of all other timber for a reasonable charge therefor.

Improvement of River on Canadian Side.

At the time of appellant's incorporation, Arrow River and Tributaries Boom & Slide Company was chartered by the Province of Ontario and vested with similar powers on the Canadian side of the river (R. 7).

The two companies, acting together by agreement, constructed their works and made their improvements, each

on its own side of the boundary, so that those of each constituted complements of those of the other. They have each ever since kept their respective improvements in repair and so jointly operated their works on the river as to render the driving of logs therein reasonably practicable. Without these improvements the river in its natural state was incapable of such use (R. 7).

Nature and Location of Improvements.

The principal features of the improvements, jointly constructed as aforesaid, and their location appear on the maps pleaded by exhibit (R. 7). A flooding dam at the outlet of South Fowl Lake is shown on Exhibit H (R. 25). The Cascades dam and sluiceway appears on Exhibit E (R. 19). A dam and sluiceway at High Falls is shown on Exhibit A (R. 11). The balance of the improvements consist of removal of rock at various points so as to clear the channel, straightening the channel itself, closing off sloughs from the main channel and the construction of various side and rolling dams to prevent timber, as it passes certain points, from becoming hung up or jammed (R. 7). Some of these latter dams are also shown on the maps.

Of these improvements, only the flooding dam at the outlet of South Fowl Lake (R. 25) is above Fort Charlotte (R. 19), hereinafter referred to.

The greater portion of the improvements lie in the river adjacent to the Indian Reservation. Those which do not are the South Fowl Dam (R. 25), the dam and sluiceway at High Falls (R. 11) and miscellaneous improvements and wing and rolling dams extending along about five and one-half miles of river between High Falls and the southeasterly boundary of the Reservation (R. 11, 13).

Basis of Decision Below.

Another action was instituted in the Federal District Court by one Clark who alleged ownership of Canadian timber which he intended to drive down the river and sought an injunction to restrain this appellant from interfering with his drives or collecting tolls therefor. The District Court, on defendant's motion, dismissed his bill. On appeal, the lower court's decision was reversed and the suit remanded for trial.

Clark vs. Pigeon, etc., Co., 52 Fed. (2d) 550.

That action was never brought on for trial and a final judgment has not been entered.

In the Clark case, the Circuit Court of Appeals held (in the language of Judge Kenyon in the case below): "(1) The movement of Canadian pulpwood on Pigeon River was foreign commerce over which the state of Minnesota could exercise no control, and (2) that the collection of tolls on this river under grant of a franchise by the state of Minnesota would be a violation of the Webster-Ashburton Treaty." The question of navigability of the river was held immaterial.

The Treaty referred to provides:

> "That all the water-communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also Grand Portage, from the Shore of Lake Superior to the Pigeon River, *as now actually used,* shall be *free and open* to the use of the citizens and subjects of both countries."
>
> *Webster-Ashburton Treaty,* 1842, 8 Stat. 572.

When the Clark decision was rendered, an action similar to the instant one was pending in the Ontario courts. The

Arrow River Company there sued a Canadian citizen to collect tolls for the use of the Canadian half of these same improvements in a like drive of timber products. The defendant there likewise set up the Treaty. That action had then reached the Supreme Court of Ontario resulting in a decision (*Arrow River and Tributaries Slide & Boom Co., Ltd.*, 39 Ont. Weekly Notes 454, 66 Ont. Law Reports 577), which construed the Treaty provision as prohibiting the Arrow River Company's improvements and the collection of tolls for their use.

The Clark decision, when rendered, was therefore in harmony with that of the Canadian courts.

The Arrow River Company case was, however, then on appeal to the Supreme Court of the Dominion of Canada; who, on March 15, 1932, after the decision in the Clark case but before the decision below in this case, by unanimous decision, reversed the Provincial Supreme Court and held, the five justices not, however, concurring in the reasons for reversal, that the Treaty did not forbid the construction of the Arrow Company's improvements in the river nor its collection of tolls for their use.

> *Arrow River and Tributaries Slide & Boom Co., Ltd., vs. Pigeon Timber Co., Ltd.*, 1932 Canadian Supreme Court Reports 495.

That decision is final, no appeal having been taken to the Privy Council at London.

The situation is therefore unique. Obviously, the Canadian company cannot maintain its part of the works, though permitted to do so under Canadian law, if the Minnesota company is prevented from maintaining its portion on the American side.

Appellee is here asserting a right to freedom from tolls

which is denied him on his own side of the boundary. Similarly, an American citizen, making use of the improvements on the Canadian side, must respond by payment of tolls for their use.

This situation prompted the court below to say:

> "If the question were now an original one we should feel that in view of the conflicting decisions as to the construction of this treaty it would be proper to certify the questions to the Supreme Court for advice, but as we have in the Clark case expressed our opinion as to how these provisions should be construed we would not we think be warranted in asking the advice of the Supreme Court in relation thereto, unless satisfied at least that our former decision was erroneous. We are not so satisfied."

Uniformity of decision by the courts of both countries is always desirable in matters concerning the rights of citizens of each on boundary waters. It is particularly desirable here, for if the decision below is adhered to not only is this appellant deprived of its investment and rights in this river, but the Ontario company suffers similarly. Unless appellant can continue the maintenance and operation of its works, neither can the Arrow River company. A dam running from the Canadian s. cannot serve any purpose if it must be chopped off at midstream.

ASSIGNMENTS OF ERROR.

Appellant claims error on the part of the lower court in the following particulars:

1. In refusing to reverse the judgment of the United States District Court for the District of Minnesota, Fifth Division.

2. In holding that section 8 of Article I of the Constitution of the United States prevents appellant from collecting reasonable and uniform tolls upon logs and timber driven, sluiced and floated by appellee upon the portion of Pigeon River within the boundaries of the state of Minnesota for the use by appellees in such operation of appellant's works, constructed, repaired, maintained and operated by it within the boundaries of the state of Minnesota in aid of driving logs thereon, pursuant to permission conferred by appellant's charter from the state of Minnesota pursuant to chapter 221, General Laws of Minnesota for the year 1889, as amended by chapter 89, General Laws of Minnesota for the year 1905.

3. In holding that Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United Statutes at Large 572, prevents appellant from collecting reasonable and uniform tolls upon logs and timber driven, sluiced and floated by appellee upon the portion of Pigeon River within the boundaries of the state of Minnesota for the use by appellee in such operation of appellant's works constructed, repaired, maintained and operated by it within the boundaries of the state of Minnesota in aid of driving logs thereon pursuant to permission conferred by appellant's charter from the state of Minnesota pursuant to chapter 221, General Laws of Minnesota for the year 1889, as amended by chapter 89, General Laws of Minnesota for the year 1905.

4. In refusing to hold that that portion of Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572, reading: "That all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also Grand Portage, from the Shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the

use of the citizens and subjects of both countries," does not apply to the portions of Pigeon River lying between South Fowl Lake and the mouth of Pigeon River where appellant's works in aid of driving logs thereon are situate.

5. In refusing to hold that that portion of Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572, reading: "That all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also Grand Portage, from the Shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries," does not apply to the portions of Pigeon River between Fort Charlotte and the mouth of Pigeon River where appellant's works in aid of driving logs thereon are situate.

6. In holding that the words "free and open," as used in Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572, apply to and forbid the collection of reasonable and uniform tolls upon logs and timber driven, sluiced and floating upon Pigeon River for the use by appellee in such operation of works constructed, repaired, maintained and operated by appellant in aid of driving logs in the portion of Pigeon River within the boundaries of the state of Minnesota, under permission conferred by its charter from the state of Minnesota, pursuant to chapter 221, General Laws of Minnesota for the year 1889, as amended by chapter 89, General Laws of Minnesota for the year 1905.

7. In holding that the movement by a Canadian citizen of logs and timber on the portion of Pigeon River within the boundaries of the state of Minnesota is foreign commerce within the meaning of section 8 of Article I of the Constitu-

tion of the United States, over which the state of Minnesota cannot exercise control to the extent of chartering appellant, pursuant to chapter 221, General Laws of Minnesota for the year 1889, as amended by chapter 89, General Laws of Minnesota for the year 1905, to construct, repair, maintain and operate works in aid of driving logs in the portion of Pigeon River within the boundaries of the state of Minnesota, and to collect reasonable and uniform tolls thereon for the use in such operation of such works.

APPELLANT'S POINTS.

In support of the assignments appellant makes the following points:

I. The Pigeon River is a non-navigable water of the United States, or, at any rate, must be so treated on this appeal. (Assignments 1, 2, 7.)

II. The boundary and territorial sovereignty of the state of Minnesota extends to the International Boundary at mid-stream in the river; hence, the state had power to authorize appellant to make improvements therein and collect tolls therefor. (Assignments 1, 2, 3, 6, 7.)

III. The maintenance of appellant's work and the collection of reasonable charges for their use is authorized by act of Congress. (Assignments 1, 2, 3, 7.)

IV. Appellant does not interfere with nor burden foreign commerce. (Assignments 1, 2, 7.)

V. The portions of Pigeon River in which appellant's improvements are located were not "water communications" within the meaning of the Treaty; they had never been "actually used" as such; hence, the Treaty does not inhibit

appellant's improvements and collection of tolls. (Assignments 1, 3, 4, 5.)

VI. The words "free and open" as used in the Treaty do not imply freedom from tolls or charges for the use of appellant's improvements. (Assignments 1, 3, 6.)

VII. If the Treaty forbids appellant's works and collection of tolls, it is superseded by the act of Congress giving appellant such rights. (Assignments 1, 3.)

VIII. The use of Pigeon River is now controlled by the Root-Bryce Treaty of 1909 which impliedly repeals the Webster-Ashburton Treaty. In so far as it may apply to Pigeon River this later Treaty permits appellant's acts alleged in the complaint. (Assignments 1, 3.)

We will argue these points in the order stated.

ARGUMENT.

I.

PIGEON RIVER IS A NON-NAVIGABLE WATER OF THE UNITED STATES

For the purposes of this appeal, the Court must assume the non-navigability of the river within the Federal rule. The Clark case failed to determine this question. The decision there turned in part on the right of appellant Clark to try that question as a question of fact in the lower court. This was not done. No further proceedings were had after that case was remanded.

Navigability Must Be Proved.

Navigability must be alleged and proved as a fact. It cannot be presumed. Only in the case of large and important rivers may the court take judicial notice of their navigable character.

Harrison vs. Fite, 148 Fed. 781 (C. C. A., 8th).
U. S. vs. Rio Grande, Etc., Co., 174 U. S. 690.
Clark vs. Pigeon River, Etc., Co., 52 Fed. (2d) 550 (C. C. A., 8th).

In *Harrison vs. Fite, supra,* the Court held:

"Courts take judicial notice of the navigable character of our important rivers and inland lakes—those that are so within our common knowledge—but there are many of such insignificant capacity and doubtful utility that the question, being one of fact, is to be determined by the evidence produced, and in such cases the burden of proof rests upon him who asserts the existence of the public servitude."

In the Rio Grande case, this Court held:

"It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear that it can fairly be said, in respect to a river known to be navigable, that it is or ought to be a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence and to be determined by proof."

The Federal Rule Controls.

Although under Minnesota law a river is navigable if it is capable of use for floating a saw log (*Clark vs. Pigeon River, Etc., Co., supra,* and cases cited), the question of navigability is here a question to be determined by Federal law and not by local standards, inasmuch as Federal questions alone are here involved.

U. S. vs. Holt State Bank, 270 U. S. 49.

Board of Hudson River District vs. Fonda, 217 N. Y. S. 781.

Under the Federal rule, the river is non-navigable.

U. S. vs. Holt State Bank, supra.

Leovy vs. U. S., 177 U. S. 621.

U. S. vs. Rio Grande, supra.

Board of Hudson River District vs. Fonda, supra.

Duluth Lbr. Co. vs. St. Louis Boom & Improvement Co., 17 Fed. 419.

In the Holt Bank case, the test was thus stated:

"The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or freight boats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be the fact, that the stream, in its natural and ordinary condition, affords a channel for useful commerce."

In the Leovy case, this Court held that the mere capacity to pass a boat of any size, however small, from one stream or rivulet to another, was not sufficient to constitute it a navigable water of the United States within Federal statutes making it a misdemeanor to obstruct navigable waters, saying:

> "The term 'navigable waters of United States' has reference to commerce of a substantial and permanent character to be conducted thereon."

In the Rio Grande case, the Rio Grande River in New Mexico was held non-navigable, though the proof showed that at times of temporary high water it could be used by small boats and for the driving of logs.

In the Fonda case, the New York Court, applying the Federal test, held that the Sacandoga River was non-navigable, notwithstanding that it could be used, with the aid of lumberjacks and artificial aids, in floating saw logs during certain months of the year.

In the Duluth Lbr. Company case, the Court held:

> "The word 'navigation' in all the statutes of the United States and in the constitutions and all the treaties does not mean the running of saw logs down a river."

A river may be navigable in part and non-navigable in another part within the Federal rule.

U. S. vs. Rio Grande, supra.

Oklahoma vs. Texas, 258 U. S. 574.

Brewer-Elliott Oil & Gas Co. vs. U. S., 260 U. S. 77.

U. S. vs. Utah, 283 U. S. 64.

Navigable character, though once existing, may be lost.

> "It does not follow that because a stream or body of water was once navigable it has since continued and

remained so. Changes may occur, especially in small and unimportant waters, from natural causes, such as the gradual attrition of the banks and the filling up of the bed with deposits of the soil, the abandonment of use followed by the encroachment of vegetation and the selection by water of other and more natural and convenient channels of escape, that work a destruction of capacity and utility as a means of transportation; and when this result may fairly be said to be permanent, a stream or lake in such condition should cease to be classed among those waters that are charged with a public use."

Harrison vs. Fite, supra.

Pigeon River Has Been Recognized as Non-Navigable by Congress.

In the act authorizing appellant to improve the portion of the river opposite the Grand Portage Indian Reservation (31 Stat. 1455, chap. 878), the improvements are authorized "for the purpose of making said river at said point navigable for floating logs."

This Congressional recognition of the necessity of improvement for floating logs is equivalent to a Congressional declaration of non-navigability.

The Complaint Alleges Non-Navigability.

The complaint pleads "that prior to appellant's improvements it was at all times incapable of use for the driving, handling and floating of logs, pulpwood and timber of other sorts thereon" (R. 6). Adaptability for navigation in its natural state is the test; hence, it must be so considered on this appeal.

Record and Facts Before the Court.

The record and historical and geographical facts properly before this Court clearly indicate and may even compel a conclusion that it is non-navigable.

The maps pleaded as exhibits (R. 11-25) show that its mouth below High Falls, where the water is at lake level, is navigable, but that from the Falls upstream it is non-navigable. High Falls has a drop of about eighty feet. The total fall of the river from Fort Charlotte (Exhibit E) to Lake Superior, some sixteen or seventeen miles by water, is about 675 feet. The river during this distance is rapid and turbulent, an almost continuous succession of falls and rapids. On either side lie high and precipitous hills. The channel, such as it is, runs between steep cut rocky cliffs, the river bed at times approaching the character of a canyon. The bed is broken by large masses of rock brought down by the process of erosion. The principal falls, proceeding upstream, are High Falls, Middle Falls, Horn Rapids and the Cascades.

Below Fort Charlotte it could not be navigated by canoe.

George M. Schwartz, professor of geology at the University of Minnesota, in an article "Topography and Geology of the Grand Portage" (Minnesota History Bulletin, Vol. 9, page 27, published by the Minnesota Historical Society), says:

> "The Pigeon River, from the location of Fort Charlotte to its mouth, flows practically due east. In detail, however, the stream is exceedingly crooked and the river flows nearly twenty miles to reach a point twelve miles away. This stretch of the river is not only crooked but also very swift, and is interrupted by falls as well as rapids. At places the river flows in a steepsided canyon with very rugged country on either side. It was thus

always out of the question to navigate the river by canoe from the mouth to the site of Fort Charlotte and it was equally impossible to find a good portage along the river."

In "The History of the Grand Portage," by Solon J. Buck, professor of history at the University of Minnesota (Minnesota History Bulletin, Vol. 5, page 14) he says that "* * * the Pigeon River, through the last twenty miles of its course before it flows into Lake Superior, is so obstructed by falls and by cascades in rocky canyons as to be impossible of navigation."

James Ferguson, writing to Daniel Webster in connection with the negotiation of the Webster-Ashburton Treaty, said:

"At the mouth of the Pigeon River, there is probably about three hundred yards in length of alluvial formation; but the river above that, as far as to near Fort Charlotte, runs between steep cut rocks of basaltic or primitive formation, and is a succession of falls and rapids for nearly its whole length—the last cataract which is within about a mile of its mouth, being almost one hundred feet in height. * * *"

Senate Documents, Third Session, 27th Congress, Vol. I.

Above Fort Charlotte it could only be traveled in part by canoe.

Sir Alexander McKenzie, writing in "Voyages from Montreal on the River St. Lawrence Through the Continent of North America to the Frozen and Pacific Oceans," published in London in 1801 describes a canoe trip in the upper portion of the river above Fort Charlotte, he having reached that point by proceeding overland on the Grand Portage Trail from Lake Superior, as follows:

"* * * In these canoes, thus loaded, they embark at the north side of the portage, on the River Au Tourt (Pigeon), which is very inconsiderable; and after about two miles of a westerly course, is obstructed by the Partridge Portage, six hundred paces long. In the spring this makes a considerable fall, when the water is high, over a perpendicular rock of one hundred and twenty feet. From thence the river continues to be shallow and requires great care to prevent the bottom of the canoe from being injured by sharp rocks, for a distance of a mile and a half to the prairie or meadow, when half of the loading is taken out and carried by part of the crew, while two of them are conducting the canoe among the rocks, with the remainder, to the Carreboeuf Portage, three miles and a half more, when they unload and come back two miles, and embark what was left for the other hands to carry, which they also land with the former; all of which is carried six hundred and eighty paces, and the canoe led up against the rapid. From hence the water is better calculated to carry canoes, and leads by a winding course to the north of west three miles to the Outard Portage over which the canoe, and everything in her, is carried for two thousand four hundred paces. At the further end is a very high hill to descend, over which hangs a rock upward of seven hundred feet high. Then succeeds the Outard (Fowl) Lake, about five miles long, lying in a northwest course and about two miles wide in the broadest part."

From this it appears that though travel by light canoe was possible in the river above Fort Charlotte (R. 19), this was accompanied with great difficulty. It was necessary to make three portages above Fort Charlotte in order to reach

South Fowl Lake. One of these, Partridge Portage, 600 paces in length, was about two miles above the Fort; another, Carreboeuf Portage, about 600 paces in length, was five miles above the Fort, and the third, Outard (Fowl) Portage, is indicated on Exhibit H (R. 25) as Fowl Portage and is better than a mile and a quarter in length and departs a full quarter mile from the river on the Canadian side. The use of these portages was made necessary by the fact that it was impossible to navigate such lengths of the upper portion of the river even by light canoe.

The river in its natural state is therefore a non-navigable water of the United States.

II.

THE BOUNDARY AND TERRITORIAL SOVEREIGNTY OF THE STATE EXTENDS TO THE INTERNATIONAL BOUNDARY AT MIDSTREAM IN THE RIVER.

The northeasterly boundary of Minnesota is thus defined in its Organic Act:

> "* * * thence down said river (St. Louis) to and through Lake Superior; on the boundary line of Wisconsin and Michigan until it intersects the dividing line between the United States and the British Possessions; thence up Pigeon River, and following said dividing line to the place of beginning. * * *"
>
> *Act February 26, 1857*, 11 Stat., chap. 60.

By the Webster-Ashburton Treaty, this dividing line between the United States and the British Possessions was defined as:

> "* * * to the mouth of Pigeon River and up the said river, to and through the North and South Fowl

Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods; thence along the water communications to Lake Saisaginaga, and through that lake; thence, to and through Cypress Lake, Lac du Bois Blanc, Lac la Croix, Little Vermilion Lake, and Lake Namecan, and through the several smaller lakes, straits or streams, connecting the lakes here mentioned, to that point in Lac la Pluie, or Rainy Lake, at the Chaudiere Falls, from which the commissioners traced the line to the most northwestern point of the Lake of the Woods."

8 *Stat.* 572.

The Root-Bryce Treaty of 1908, Article V, provides:

"In order to complete and perfect the demarcation of the international boundary line between the United States and the Dominion of Canada from the mouth of Pigeon River * * * to the northwesternmost point of the Lake of the Woods, which boundary is defined in Article II of the Treaty of Peace * * * dated September 3, 1783, and in Article II of the Treaty of August 9, 1842 * * *.

"* * * each of the High Contracting Parties shall appoint * * * Commissioners, who shall re-establish and fix the actual location of said entire boundary described and charted as aforesaid * * *.

"The line so defined and laid down shall be taken and deemed to be the international boundary as defined and established under the aforesaid treaties from the mouth of Pigeon River to the northwesternmost point of the Lake of the Woods."

36 *Stat.* 2141, Article V.

This boundary, so determined, is shown on the Inter-

national Joint Boundary Commission maps, pleaded as exhibits.

From this it is clear that the northeasterly boundary of Minnesota is co-incident with the International Boundary in the river and is not, as appellee claimed in the court below, the southwesterly bank of the river.

The jurisdiction of the state is co-extensive with this boundary subject only to the limitation that it should not be so extended as to entrench upon the assumed authority of the national government or to impair rights secured or perfected by the Constitution.

Henderson Bridge Co. vs. Henderson, 173 U. S. 592.

Manchester vs. Massachusetts, 139 U. S. 264.

Humboldt, Etc., Ass'n vs. Christopherson, 73 Fed. 239 (C. C. A.).

The northern boundary of Minnesota in Rainy River is similarly defined by the Enabling Act and these Treaties. It has been held that the boundary and territorial sovereignty of Minnesota extends to the International Boundary in that river.

Rainy Lake River Boom Co. vs. Lumber Co., 162 Fed. 287.

Ex parte Dove, 49 Fed. (2d) 816.

State vs. Dove, 183 Minn. 272 (236 N. W. 322).

In the Rainy Lake case, involving rights of a boom company in that river, the Court said:

> "* * * The jurisdiction of the state of Minnesota could not extend beyond the center channel of the river, * * *. The only ground upon which the power of the state of Minnesota to make regulations to be asserted through a corporation, as this boom company, respecting the navigation of and floating logs on waterways, is that

> it is within its territory. * * * It may be conceded that either party to this treaty might authorize the construction of booms or other artificial structure within the boundary of its jurisdiction to aid in the floating of logs. * * *"

In *Ex parte Dove*, the Court held that the Federal government had not yet taken over the regulation of fishing in Rainy River and the state had the power to regulate it on its side of the boundary.

> "If the subject-matter is covered by state regulation, that regulation should not be stricken down or interfered with until a real conflict between state and federal authority or between state laws and the treaty should arise. No such situation has developed here."

In *State vs. Dove, supra*, the Court held that the "free and open" provision of the Webster-Ashburton Treaty "does not relate to the regulation of fishing in the waters referred to (Rainy River)," and that "the use here spoken of is for travel," and that until the joint governments, under authority of the Root-Bryce Treaty of 1908, took over the regulation of fishing in that international water, "there has been no withdrawing of the state's jurisdiction to control and regulate the catching of fish in that part of Rainy Lake which lies within its own territory, that is in this case, within Koochiching County."

It follows that the territorial boundary and sovereignty of Minnesota likewise extends to the International Boundary in Pigeon River.

III.

THE MAINTENANCE OF APPELLANT'S WORKS AND THE COLLECTION OF REASONABLE CHARGES FOR THEIR USE IS AUTHORIZED BY ACT OF CONGRESS.

Act, March 3, 1901 (31 Stat. 1455, chap. 878), provides that appellant is authorized "to enter upon and improve the Pigeon River at what is known as the cascades of said river for the purpose of making said river at said point navigable for floating logs, and to that end to enter upon the unallotted lands and, with the consent of the allottees, upon any allotted lands adjacent to said cascades, of the Grand Portage Indian Reservation, in said state, and to construct such sluice dams, wing dams, bulkheads, spill dams and other works necessary for said purpose."

It further provides "that said river, after being so improved, shall be open at all times to the free passage of all timber cut from said Grand Portage Indian Reservation, and to the passage of all other timber for a reasonable charge therefor."

Although this statute is not pleaded as a basis of appellant's rights, the Court must take judicial notice of it.

It is not a private bill as defined by 28 Stat. 609 (44 U. S. C. 189), but is a public bill appearing in the Statutes at Large as such. It must therefore be judicially noticed without pleading.

Matter of Dunn, 212 U. S. 374.
Texas & P. R. Co. vs. Docy, 166 U. S. 606.
Gardner vs. The Collector, 6 Wall. 499, 508.
Case vs. Kelly, et al., 133 U. S. 21.

The authority to construct its works is subject to rules and regulations to be prescribed by the Secretary of the

Interior and the company is required to construct suitable fishways to be approved by the United States Fish Commission.

There being no proof to the contrary, appellant's compliance with these conditions must be presumed.

Smith vs. Chesapeake & O. Canal Co., 14 Pet. 45.
Southern Pac. Co. vs. Stewart, 245 U. S. 359.
American Ry. Express Co. vs. Lindenberg, 260 U. S. 584.

The Act is in the nature of a contract for the mutual benefit of both the Federal government and appellant.

Appellant purchased timber from the government, improved the river so as to permit timber, taken from these lands by the allottees, to be transported for sale, and gave a perpetual free right of passage for the benefit of all timber on the Reservation, thus enhancing the value of these lands and directly benefitting the Federal government. In consideration thereof, the Federal government gave its consent to the improvements and authorized the collection of tolls from all timber other than that cut on the Reservation. Appellant has fulfilled its part of the bargain. The Act is therefore of particular force and binds the national honor.

Construction of the Act.

As was explained by Mr. Morris, of Minnesota, who introduced the House Bill, when unanimous consent was obtained to call it up for a vote (Congressional Record, 56th Congress, Second Session, page 3462), it was only considered necessary by reason of the existence of the Reservation adjacent to a portion of the river, the stream being evidently considered non-navigable and Congressional authority necessary only by reason of this circumstance.

We claim, however, that it conferred rights upon appel-

lant throughout the entire length of the river, not simply that portion adjacent to the Reservation.

We have heretofore mentioned certain works: a dam and sluiceway shown on Exhibit E, within the Reservation. Upon that exhibit their location is indicated by the Joint Boundary Commission as "The Cascades." It is not this dam and sluiceway alone which the Act authorized.

From the wording of the Act, giving the right "to enter upon and improve Pigeon River at what is known as the cascades of said river for the purpose of making said river at said point navigable for floating logs," it may be claimed that the bill only authorized the one dam and sluiceway at this one point.

Opposed to this construction, we have the following considerations compelling the broader construction for which we contend:

(1) The term "the cascades" is not capitalized; hence, not used as a proper name—the style of a particular point.

(2) Cascade, the noun, is defined in Webster's New International Dictionary as "a fall of water over a precipice as in a river or brook, especially a small one or one of a series; a waterfall less than a cataract." In the Act, the plural "cascades," is used; hence, reference is made to a series or succession, a number of such falls, a term aptly describing the entire length of the river below Fort Charlotte.

(3) The right is given to enter "upon the unallotted lands and with the consent of the allottees upon any allotted lands adjacent to said cascades." Since Indian allotments of agricultural lands usually comprise eighty acres, appellant is given the right to enter upon Reservation lands adjacent to a considerable length of the river rather than but a

short stretch adjacent to but one, or at the most, two allotments.

(4) The Act gives the right, not to construct one dam and one sluiceway, but to construct "sluice dams, wing dams, bulkheads, spill dams and other works necessary for said purpose," and hence to construct the number of dams of various sorts necessary to make this river available for log driving throughout its entire length below Fort Charlotte.

(5) The Act should be construed with a view to making it effective for the purpose intended which was to so improve the river, throughout its entire length, as to make it possible to get out timber, not only from the Reservation, but from all other points. Obviously, the construction of a single dam and sluiceway would of itself accomplish nothing, other than the waste of a considerable amount of money, if unaccompanied with the building of such other flooding, side, wing and rolling dams and sluiceways in other parts of the river and such clearing and straightening of the channel as would make it possible to drive logs down the river's entire length from the one dam and sluiceway specifically mentioned.

These considerations compel a construction that the Act is applicable to the entire length of the river below Fort Charlotte.

However, it probably makes no very great difference, on this appeal, how this question of construction is resolved. It is clear that the dam and sluiceway at the Cascades, at least, are authorized. On a trial of the action, appellant, under the allegations of the complaint, could show that such works were either directly or indirectly made use of in appellee's driving. Notwithstanding the fact that appellee's logs were put into the stream some distance below this dam

and sluiceway, we could show, for instance, that this dam was used to impound and periodically release floods of water so as to flush appellee's logs down the stream, the quantity of water available being insufficient to furnish a continuous flood tide for such purpose.

Even if appellant's rights were entirely derived from this Act and regardless of whether it be given a strict or a liberal construction, this Court must necessarily hold that the complaint states a cause of action for some, if not all the relief sought by appellant, and the decision of the lower court sustaining the judgment of dismissal was therefore error.

IV.

APPELLANT DOES NOT INTERFERE WITH NOR BURDEN FOREIGN COMMERCE.

This question becomes material only to the extent that some of appellant's improvements and the collection of its charges for the use thereof do not have direct Federal authorization.

The extent and nature of the Federal power over foreign commerce is no different than that over interstate commerce. What can be said of Federal power as to the one is equally applicable to the other.

The power is supreme and plenary. It is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than the Constitution. As to subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act,

and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. The states therefore cannot impose direct burdens upon interstate commerce. Thus, they can neither tax nor prohibit it. Until Congress acts, they possess, however, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate or foreign commerce may be thereby affected. This extends to all matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects, though having an obvious and direct relation to interstate commerce, which should not remain unregulated and their regulation should be adapted to local conditions; hence, the absence of regulation by Congress in such matters does not import that there should be no state regulation, but rather that the state should continue to supply the needed regulation until Congress should decide to supersede them.

Minnesota Rate Cases, 230 U. S. 352, 98.

Thus, until Congress took over the control of all the navigable waters of the United States, the states were at all times free to improve portions of navigable waterways within their territorial boundaries and to exact or authorize others to exact tolls or charges for the use thereof, notwithstanding the consequent burden thus placed upon interstate or foreign commerce.

Wilson vs. Blackbird Marsh Co., 2 Pet. 245.

Pound vs. Turck, 95 U. S. 495.

Parkersburg & O. R. Transportation Co. vs. Parkersburg, 107 U. S. 691.

Huse vs. Glover, 119 U. S. 543.

Sands vs. Manistee Improvement Co., 123 U. S. 288.

Monongahela Navigation Co. vs. U. S., 148 U. S. 312.
Lindsay & Phelps Co. vs. Mullen, 176 U. S. 126.
Thames Bank vs. Lowell, 18 Conn. 500.

In the Blackbird Marsh case, *supra*, involving the construction of a dam in a navigable stream under state authority, the court, Marshall, C. J., said:

> "We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state."

In *Pound vs. Turck*, *supra*, involving a dam and boom placed in the Chippewa River under authority of the Wisconsin Legislature, the Court said:

> "There are within the state of Wisconsin * * * many small streams navigable for a short distance from their mouths * * * by steamboats, but whose greatest value in water carriage is as outlets to saw logs. * * * In order to develop their greatest outlet in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, * * * but to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislature."

In *Huse vs. Glover, supra,* the state of Illinois, through a board of canal commissioners, constructed locks and a dam in the Illinois River and prescribed tolls therefor. Against the objection that this was an interference with interstate commerce, the Court held:

> "The exaction of tolls for passage through the locks is as compensation for artificial facilities constructed, not as an impost upon the navigation of the stream. * * * For outlays caused by such works, the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed for the purpose of facilitating the landing of persons and freight. The state is interested in the domestic as well as the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities and thus augment its growth it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce that that body may interfere and control or supersede it. * * * How the highways of the state, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to intervene. * * *"

In the Sands case, *supra,* the Court said:

> "The internal commerce of the state * * * * is as much under its control as foreign or interstate commerce is under the control of the general government, and to encourage the growth of this commerce and render it safe the states may provide for the removal of obstructions from their rivers and harbors and deepen their channels and improve them in other ways, * * *

and to meet the cost of such improvements the states may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are in that respect like wharves and docks constructed to facilitate commerce in loading and unloading vessels."

In the Monongahela case, *supra,* that company had been authorized by Pennsylvania to improve the river of that name by construction of locks and dams and authorized to levy tolls therefor. The Federal government acquired it by eminent domain. The question on appeal was whether the value of the franchise to collect tolls must be paid for, as well as the physical value of the improvements themselves, the Court holding that they must.

"In the absence of Congressional action, the state of Pennsylvania had the power, either acting itself or through a corporation which it chartered, to improve the navigation of the river by means of locks and dams and also to authorize the exaction of tolls for the use of such improvements."

In *Thames Bank vs. Lovell, supra,* quoted with approval in the Monongahela case, the Court says:

"The acts, improving rivers, constructing roads, etc., will never be complained of as interfering with the rights and powers of Congress. The tolls alone are the subject of complaint. But these are only the fair equivalent for privileges which the state had a right to create, and without which these privileges could never have existed. Commerce, therefore, has not been crippled by the tolls, as the defendant claims, but has been extended by them. The legislature of the state creating this corporation, with its duties and its privileges, has come in

aid of the powers of Congress.

"It seems to be admitted, that states may construct canals, turnpikes, bridges, etc., and impose tolls upon passengers and freight as a remuneration for the improvements; and that this may be done, without interfering with the power of Congress to regulate commerce among the states, or its power to establish post offices and post roads. We have not been able to discover a sound distinction between these cases and the one we are considering. Congress has the same power to regulate commerce upon the land as upon the water. A river, to be sure, is a natural channel; but, if it is not a navigable one, it can no more be used for the purpose of commerce than the land, and therefore to convert it from the mere natural channel into a public highway, for commercial purposes, and to levy a toll to reimburse the expense, no more conflicts with the powers of Congress over the commerce of the country than the construction of a canal or a turnpike for the same purposes, with the same tolls. And this, we think is equally true of rivers, which are only navigable to a partial and limited extent, and by artificial and expensive means are rendered navigable to a greater extent, with a reasonable toll levied upon those only who receive the benefit of the extended navigation. The principle is the same in both the cases stated."

In the Mullen case, *supra*, a Minnesota boom company had been authorized by state law to place its works on the Minnesota side of the Mississippi River and to collect charges on logs passing through the boom.

"The state has a right to improve the waterways within its limits and to make reasonable charges for the

use of such improvements, at least until Congress interferes, and either itself assumes control of the improvements or compels their removal. * * * The state of Minnesota had therefore the undoubted right to improve this portion of the Mississippi River lying southwest of the island for the purpose of facilitating the navigation of logs. It could do the work itself or could authorize a corporation to do the work and it could prescribe any reasonable fees for the use of the improvements. * * * We are of the opinion that the improvements made in the Mississippi River by the construction of the boom and its works and the exaction of reasonable charges for the use of such works, including fees of state officials for inspecting and scaling, if done under state authority, cannot be considered in any just sense a burden upon interstate commerce. It is not more than action on the part of a state in furnishing additional facilities for the navigation of the waterway, and for such additional facilities reasonable charges may be exacted."

The improvement and regulation of navigable waterways was for a long time left largely to the states. It was not until 1890 that Congress assumed any material control and then only to a limited extent.

The key to Lake Superior, the St. Mary's or St. Ste. Marie Canal and Locks, was constructed by the state of Michigan out of the proceeds of a land grant from the Federal government and the collection of tolls on all vessels except those owned by the Federal government was authorized. (Act August 26, 1852, 10 Stat. 35.) The canal was administered by a board of control set up by the state and tolls of four cents per enrolled ton were charged all vessels passing

through the locks. Laws Michigan, 1855, page 195 (Michigan Compiled Statutes, 1857, par. 2578).

It was not until 1880 that the Federal government purchased the canal from Michigan and commenced its operation, free from tolls.

Act June 14, 1880, 21 Stat. 180.

The St. Claire River Ship Canal, a necessary link between Lake Erie and Lake Huron, was operated by the Federal government. Discriminatory tolls were formerly charged of British vessels passing through the canal. Equality of treatment was secured by the Treaty of Washington, 1871, Article XXVII, which provided "the government of the United States engages that the subjects of Her Brittonic Majesty shall enjoy the use of the St. Claire Flats Canal on terms of equality with inhabitants of the United States.

17 *Stat.* 863.

In 1890 the erection of obstructions in navigable waters of the United States was first regulated by general law which provided:

> "That the creation of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction is hereby prohibited."
>
> *Act September 19, 1890,* 26 Stat. 426, chap. 907, sec. 10.

Even under this statute obstructions to navigation authorized by the states might be constructed and continued without authority from Congress, the words "not affirmatively authorized by law" being construed as meaning authorization from either the state or Federal government.

U. S. vs. Bellingham Bay Boom Co., 176 U. S. 211.

By Act July 13, 1892 (27 Stat. 88, chap. 158, sec. 7), permission from the Secretary of War was first required in addition to state authority.

It was not until 1899 that the entire control of navigable waters of the United States was withdrawn from the states and taken over by Congress by the Rivers and Harbors Act of that year.

Act March 3, 1899, 30 Stat. 1151.

Since this enactment permission from the state as to navigable waters within its own territorial limits is still necessary in order to make the authority for the improvement complete and perfect.

Montgomery vs. Portland, 190 U. S. 89.

As late as 1905 private corporations were authorized by Congress to improve navigable waters of the United States and to collect tolls therefor.

In that year the Cumberland River Improvement Company was authorized to improve that river above Burnside, Kentucky, by the construction of locks and dams and to charge tolls for the use of these improvements. The Cumberland is an interstate navigable water.

Likewise, the Nome Improvement Company was authorized to dredge the Snake River near Nome, Alaska, for a distance of five thousand feet from its mouth for the development of harbor facilities and was authorized to levy tolls on all vessels using the harbor.

Act March 3, 1905, 33 Stat. 1117, chap. 1482.

Congress has, however, never assumed to regulate or control non-navigable waters. The power of the states over them remains as it always has been. Within their territorial limits they may either improve or authorize their improve-

ment and may collect or authorize the collection of tolls therefor in the same manner as they formally did in the case of navigable waters.

Undoubtedly, Congress might, under the Commerce Clause, regulate interstate or foreign commerce over non-navigable waters. Its power in that regard is supreme, just as it is over highways used in interstate or foreign traffic. The power has, however, never been exercised and until it is the power of the state is supreme and plenary.

The power of the state to improve or authorize the improvement of the portion of this river—a non-navigable stream—within its territorial limits is similar to the power of the state over its highways, though used in interstate or foreign commerce.

It has frequently been held by this Court, in late decisions, that the states, in the absence of Congressional action, may levy license fees or taxes on the use of their highways in interstate commerce as compensation for the use of facilities provided, and that this is not an unconstitutional burden on interstate commerce.

Hendrick vs. Montana, 235 U. S. 610.
Kane vs. New Jersey, 242 U. S. 160.
International Busses Corp. vs. Blodgett, 276 U. S. 245.
Sprout vs. South Bend, 277 U. S. 163.
International Transit Co. vs. Lindsey, 283 U. S. 183.
Continental Baking Co. vs. Wooding, 286 U. S. 352.
Sproles vs. Binford, 286 U. S. 374.

In the Hendrick case, it was held:

"In view of the many decisions of this Court there can be no serious doubt that where a state, at its own expense, furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it

may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, they constitute no burden on interstate commerce."

In *Interstate Transit Co. vs. Lindsey,* the Court said:

"While a state may not lay a tax on the privilege of engaging in interstate commerce, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic."

In the Sproles case, it is said:

"In the instant case there is no discrimination against interstate commerce and the regulations adopted by the state, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act."

The principles established by these decisions cannot be divorced from application to the instant case, notwithstanding the fact that here we have, not interstate, but foreign commerce; not a highway over land, but a non-navigable waterway.

It therefore follows that the imposition and collection of reasonable tolls for the use of appellant's improvements to the river under authority from the state of Minnesota in no sense offends the Commerce Clause.

V.

THE PORTIONS OF PIGEON RIVER IN WHICH APPELLANT'S IMPROVEMENTS ARE LOCATED WERE NOT "WATER COMMUNICATIONS" WITHIN THE MEANING OF THE TREATY; THEY HAD NEVER BEEN "ACTUALLY USED" AS SUCH; HENCE THE TREATY DOES NOT INHIBIT APPELLANT'S IMPROVEMENTS AND COLLECTION OF TOLLS.

The Treaty provides:

> "That *all the water communications and all the usual portages* along the line from Lake Superior to the Lake of the Woods, *and also Grand Portage*, from the shore of Lake Superior to the Pigeon River, *as now actually used*, shall be free and open to the use of the citizens and subjects of both countries."
>
> 8 *Stat.* 572.

Our position is that the words "as now actually used" refer back to and limit all that precedes; in other words, that the Treaty makes only ~~such~~ of the "water communications" and of the "usual portages" along the boundary line and the Grand Portage as were then "actually used," "free and open" to both countries.

In order to understand the Treaty, reference must first be made to its historical and geographical background.

History and Location of Grand Portage Trail.

We have already referred at length to the character of the river below the point known as Fort Charlotte. This point is indicated on Exhibit E (R. 19), several miles upstream from the Cascades dam and sluiceway, but within the Indian Reservation.

Because of the character of the river and the adjacent country below Fort Charlotte, it was impossible to navigate any part of the river below the Fort, even with the light canoes then in use and it was likewise impossible to follow the line of the river to reach Fort Charlotte.

By reason of this fact the Grand Portage Trail extended from Grand Portage on Grand Portage Bay on Lake Superior, in a northerly and westerly direction, by more or less direct line, a distance of some nine miles, to the Pigeon River at Fort Charlotte (R. 19). This Grand Portage Bay is some six miles westerly from the International Boundary and within the state of Minnesota. It is shown at the extreme easterly end of Exhibit I (R. 27).

The trail was probably located by Indians, but developed by the Northwest Fur Company, a British company, because of the impossibility of reaching the upper Pigeon River in any other way.

In this fur trade, provisions, store and baggage were transferred at Grand Portage Bay from boats used on Lake Superior and packed on human backs along the portage to Fort Charlotte where they were put into canoes and from there carried, alternately by canoe and on the back, along portages where falls or rapids and the contour of the country necessitated their use, to South Fowl Lake. Alternate use of lakes and portages was then made until finally a portage was made across the height of land between South and North

Fowl Lakes and the waters on the other side of the divide extending westerly and into Rainy River, were reached. Furs from the interior were brought down via Fort Charlotte to Grand Portage Bay, in the same way.

In this traffic it was not only necessary to make use of the Grand Portage trail, but of three other well defined portages along the river between Fort Charlotte and South Fowl Lake. It was likewise necessary to make numerous other portages between South Fowl Lake and Lake of the Woods.

These "usual portages" along the boundary as well as Grand Portage as they were "actually used" prior to the Treaty are the ones referred to in its text.

The following note to letters of DePeyster to General Haldimand appears in Wisconsin Historical Collections, Vol. XI (1888), page 123:.

> "The Grand Portage post was at the head of a bay on the northwest coast of Lake Superior, some five miles above (southwest of) the mouth of Pigeon River. From here, there was a carrying place of three leagues (nine miles) in length, northward to a widening of the Pigeon. The Grand Portage settlement was the great halting place of voyageurs and an important depot for the fur trade in that section. At the other end of the trail was another fort, to protect the portage from the north * * * by 1880, under English rule, it was styled Fort Charlotte. * * * After leaving Fort Charlotte the voyageurs ascended Pigeon River, which is crooked and often widens into lakes, frequent short portages being made to avoid the bend and rapids. The intricate watercourses followed were what now form the international boundary as far as the Lake of the Woods; * * *"

At this point we again refer to Sir Alexander McKenzie's description of the necessary portages in the upper part of the river, set forth at length at page 20, ante.

Alexander Henry was a fur trader of the Northwest Company. David Thompson was official geographer and explorer of the same company. Their manuscript journals were edited by Elliott Coues and published in New York by Francis P. Harper in 1897. The following quotation is extracted from this work, Vol. I, page 6:

"Saturday, July 19, 1800, 3 P. M., our baggage and other necessities having been carried over the portage which is about nine miles, our men fully equipped for the year and their accounts settled, I set off for Fort Charlotte, where I arrived at 5 P. M. The portage was very bad in some places, being knee deep in mud and clay, and so slippery as to make walking tedious.

"Sunday, July 20th. The canoes having been given out to the men to gum and prepare, I found everything ready for our departure. * * *

"At ten o'clock the brigade were all off, and at three o'clock I followed. The water was very low. In a short time we came to Partridge Portage, of about 600 paces over. The road was very slippery and muddy. Having got our baggage over, we embarked and proceeded to the prairie, where our people were camped.

"July 21st. The canoes were early on the water with half a load, which was conveyed so to Grosse Roche (Gross Rock). There we found the water so low that we were obliged to carry all our baggage and canoes over for about 1,000 paces, through a path made by a number of small pines which had lately been blown down. We then, by means of half loads, proceeded to Caribou Portage, over which our baggage was carried

about 700 paces, while the canoes were towed up among the rocks. We then proceeded to Outard (Fowl) Portage with half a load, and put up for the night, having sent the canoes back for the rest."

Other Portages Along the Line.

From the exhibits and historical references heretofore set forth, it appears that in addition to the Grand Portage itself there were numerous other portages "along the line," including the following:

Partridge Portage, 600 paces long, about two miles above Fort Charlotte; Carreboeuf Portage, [illegible]0 paces in length, about five miles above the Forf; Outard (Fowl) Portage, 2,400 paces in length, avoiding the falls and rapids in the portion of the Pigeon River immediately below South Fowl Lake. This latter portage is shown on Exhibit H as Fowl Portage (R. 25). It is better than a mile and a quarter in length and is for the most part a full quarter mile distant from the river and boundary, on the Canadian side. All these portages, though shorter than the Grand Portage, were, in general, considerable distances from the Pigeon River, well within what is now either American or Canadian territory, followed well defined routes through the forest and were made necessary, just as was Grand Portage, by the fact that the river adjacent to them could not be navigated, even by light canoes.

In addition to these, there were other necessary portages farther west along the boundary. The chief of these are shown on Exhibit I (R. 27) and may be briefly enumerated: Moose Portage, between North Fowl and Moose Lake; Long Portage, between Watap and Rose Lake; and a portage over the height of land, between North and South Lakes;

and Bottle Portage, between Iron Lake and Irving Island. When the Treaty was made, the location and line of these portages and of the intervening water communications, was a matter of certain knowledge. Geographical knowledge of the region was then practically limited to this land-water trail itself.

These portages, *as then used*, and the intervening water courses, *as then used*, constituted the boundary line first proposed by Lord Ashburton to Daniel Webster in their negotiations, a line which, as he says, "has the advantage of being known and attended with no doubt or uncertainty in running it."

Construction of the Treaty.

When the meaning of a treaty is uncertain, recourse should properly be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter and to their own practical construction of it.

Neilson vs. Johnson, 279 U. S. 47.

U. S. vs. Texas, 162 U. S. 1.

A treaty is to be read in the light of the conditions and circumstances existing at the time it was entered into, with a view to effecting the objects and purposes of the states thereto by contracting.

Ross vs. McIntyre, 140 U. S. 453.

Bearing on its construction, we have not only President Tyler's message submitting the Treaty to the Senate, but also the diplomatic correspondence between Daniel Webster and Lord Ashburton tracing the negotiations between them and indicating the purpose of the respective governments. This was all made public and is found in Senate Documents, Third Session, 27th Congress, Vol. 1. This, we believe, es-

tablishes the correctness of our position. We will hereafter refer to extracts from this correspondence without further specific citation.

This correspondence shows that the words "*as now actually used*" refer back to and limit all that precedes; hence, that the Treaty makes only such of the "*water communications*" and of the "*usual portages*" along the line and the Grand Portage as then formed links in this land-water trail, "*free and open*" to both countries.

The portion of Pigeon River extending downstream from Fort Charlotte was never a part of this land-water trail and was not therefore made "*free and open.*" In its place was substituted the Grand Portage Trail.

Likewise, the portion of Pigeon River extending for a mile and a quarter below South Fowl Lake, wherein appellant has a flooding dam, was never a part of this land-water trail and was not made "*free and open.*" In its place was substituted Outard (Fowl) Portage, a mile and a quarter in length and a full quarter mile distant from the river and boundary, on the Canadian side of the river.

In the Clark case, Judge Kenyon said:

> "As a matter of grammatical construction an argument might be made that the term 'as now actually used' applies to all the water communications and early portages and not merely to Grand Portage, but it appears from the record that Grand Portage alone of all the portages is not 'along the line,' and we think therefore the words 'as now actually used' refer only to Grand Portage. Any other theory would give the Treaty a narrow and apparently distorted construction."

In this statement the Court made a wrong assumption

of fact. Fowl Portage, for instance, was not "along the line," although closer to it than Grand Portage, and throughout its entire length was a full quarter mile within British territory. Its route has been marked on the International Boundary Commission maps and appears on Exhibit H (R. 25).

The claim here made was likewise presented to the Canadian Supreme Court in the recent *Arrow River, Etc., Co. vs. Pigeon Timber Co., Ltd., supra.* Of the five Judges, Justice Lamont, concurred in by Justice Cannon, cites the Clark case and adheres to the construction there given the Treaty. Justice Smith, Justice Renfert concurring, takes the opposite view and holds:

> "The right preserved by the provision of the Treaty quoted was the right *to use the water communications and portages then in use.* There could, so far as I can see, have been no reason for preserving a right to use Grand Portage that would not apply to the other portages, and the language as used appears to apply to all and to all water communications, and I think should be so construed. What was being dealt with and what was in the contemplation of the parties was travel and transportation over the water communications and portages *as then used,* and there was, in my opinion, no thought or intention of dealing with the use of these non-navigable rapids and falls that were not in use and could not be used, the passing of which was provided for by portages."

The diplomatic correspondence preliminary to the Treaty, taken in connection with the history and situation of the trail and various portages, compels a conclusion in accordance with that of Justices Smith and Renfert of the

Canadian Supreme Court: That the provision in question applies only to such of the portages and of the water communications as were then in use and that the decision of the Court below was therefore wrong.

Indeed the use of the term "water-communications" of itself implies a meaning of *waters used as a means of communication*. If this is not so, why was the word "waters" not used instead?

History of Selection of the Boundary.

The boundary between the United States and Canada, west of Lake Superior, was never definitely fixed until the Treaty of 1842.

The Treaty of Paris (8 Stat. 80, Article II) describes this boundary as "through Lake Superior northwards of Isles Royale and Philipeaux to the Long Lake; thence through the middle of said Long Lake and the water communications, between it and the Lake of the Woods."

Long Lake was not indicated on any existing map and at the conclusion of the War of 1812 the commissioners who had been appointed to settle boundary disputes between the two countries were unable to agree upon this portion of the boundary.

Lord Ashburton, on July 16, 1842, wrote Mr. Webster in reference to the then pending settlement of this boundary:

> "* * * it really appears of little importance to either party how the line be determined through the wild country between Lake Superior and Lake of the Woods, but it is important that some line should be fixed and known.
>
> "The American commissioner asked for the line from Lake Superior, up the River Kamanastiguia, to the lake

called Dog Lake, which he supposed to be the same as that called Long Lake in the treaties; thence through Sturgeon Lake to the Lac La Pluie, to that point where the two lines assumed by the commissioners again meet.

"The British commissioner, on the other hand contended for a line from the southwestern extremity, at a point called le Fond du Lac (now within the city of Duluth), to the middle of the mouth of the estuary or lake of St. Louis River; thence up that river, through Vermilion River to Lac La Pluie.

"Attempts were made to compromise these differences; but they failed, apparently more from neither party being willing to give up the island of St. George's, than from much importance being attached to any other part of the case.

"Upon the line from Lake Superior to the Lake of the Woods, both commissioners agreed to abandon their respective claims, and to adopt a middle course, for which the American commissioner admitted that there was some ground of preference. This was from Pigeon River, a point between Kamanastiguia and the Fond du Lac; and although there were differences as to the precise point near the mouth of Pigeon River, where the line should begin, neither party seemed to have attached much importance to this part of the subject.

"I would propose that the line be taken from a point about six miles south of Pigeon River, where the Grand Portage commences on the lake, and continued along the line of said portage, *alternately by land and water*, to Lac La Pluie—*the existing route by land and by water remaining common to both parties.* This line has the advantage of being known, and attended with no doubt or uncertainty in running it. * * *

The Lac La Pluie he refers to is the same as Rainy Lake, from which point westerly the boundary had been definitely determined in 1783 by the Treaty of Paris.

Had this proposal been accepted, the alternate land-water trail itself, extending from Lake Superior to Rainy Lake, as then used, would have constituted the common boundary. Apparently the British attached no importance to any part of the Pigeon River except such parts as were necessary links in this chain of communications. The only consideration of the British commissioner was to secure for British subjects the right to the "*common use*" of this land-water trail.

On July 25, 1842, Mr. Webster wrote James Ferguson, an astronomer and surveyor, who had surveyed this section for the commissioners appointed by the Treaty of Ghent, making this reference in the letter:

> "There is said to be *two lines of communication, each partly by water and partly by portages*, from the neighborhood of Pigeon River to the Rainy Lake; one by way of Fowl Lakes, the Saganaga Lake, and the Cypress Lake; the other by way of Arrow River and Lake; then by way of Saganaga Lake, and through the River Maligne, meeting the other route at Lake La Croix, and through the River Nemekan to the Rainy Lake. Do you know any reason for attaching greater preference to either of these two lines? Or do you consider it of no importance, in any point of view, which may be agreed to? * * *"

To this Ferguson replied that there was no reason for preferring one over the other, but expressed a preference for a boundary generally following the "old commercial route" by commencing at Pigeon River.

Mr. Webster then, on July 26, 1842, wrote to Lord Ashburton proposing an alternative, the description of the boundary later embodied in the Treaty, to which he appended the provision of Article II here in question. Explanatory of this proposal, he wrote:

> "It is desirable to follow the description and the exact line of the original Treaty as far as practicable. There is reason to think that 'Long Lake,' mentioned in the Treaty of 1783, meant merely the estuary of the Pigeon River, as no lake called 'Long Lake,' or any other water strictly conforming to the idea of a lake, is found in that quarter. This opinion is strengthened by the fact that the words of the Treaty would seem to imply that the water intended as 'Long Lake' was immediately joining Lake Superior. In one respect, an exact compliance with the words of the Treaty is not practicable. There is no continuous water communication between Lake Superior and the Lake of the Woods, as the Lake of the Woods is known to discharge its waters through the Red River of the North into Hudson's Bay. The dividing height or ridge between the eastern sources of the tributaries of the Lake of the Woods, and the western sources of Pigeon River, appears, by authentic maps, to be distant about forty miles from the mouth of the Pigeon River, on the shore of Lake Superior. * * *"

The adoption of Webster's line, without further agreement regarding the use of the old land-water trail, would have prevented British citizens from passing through American territory on Grand Portage and on other necessary portages on the American side of the boundary, and would likewise have prevented our own citizens from passing

through British territory where the existing portages made this necessary. Ashburton had insisted that the land-water trail be subject to the common use of the citizens of both countries. This had evidently been his chief reason for proposing that it, rather than Pigeon River and the other waters along the present line, be established as the boundary. In order to answer the objection which Mr. Webster knew would be raised, were a common use of the land-water trail not provided for, he added the provision here in question and explained it in his letter, as follows:

> *"The broken and difficult nature of the water communication from Lake Superior to the Lake of the Woods renders numerous portages necessary; and it is right that these water communications and these portages should make a common highway, where necessary, for the use of the subjects and citizens of both governments. * * *"*

In so providing there was no thought of preserving any right to the common use of the portion of Pigeon River below Fort Charlotte, nor to any other portions of the river around which portages had to be made. The sole consideration that prompted the insertion of this provision in the Treaty was the British commissioner's anxiety for the preservation of the land-water trail and the consequent agreed purpose of the two negotiators to secure for the "common use" of the citizens of both countries the alternate land-water route *"as now actually used."* This is evident from Mr. Webster's explanation in this letter that "it is right that *these water communications* and *these portages* should make *a common highway where necessary* for the use of the subjects and citizens of both governments."

In the light of the history of the trial, the topography and

geography of the river and adjacent country and the purpose of the two commissioners evidenced by their correspondence, it is quite apparent that the words *"as now actually used"* modify all that precedes. It is only such portages and only such portions of the Pigeon River *as were then in use* that were intended to constitute this *common highway*.

We therefore submit that the lower court erred in holding that the maintenance of appellant's works in the portion of the Pigeon River below Fort Charlotte was prohibited by the Treaty provision, and likewise erred in holding that the maintenance of appellant's flooding dam at the outlet of South Fowl Lake was similarly prohibited.

VI.

THE WORDS "FREE AND OPEN" DO NOT IMPLY FREEDOM FROM TOLLS OR CHARGES FOR THE USE OF APPELLANT'S IMPROVEMENTS.

We further claim that the expression *"free and open"* used in the Treaty, was used in the common, accepted sense of that term as interpreted by the courts of this country.

It does not imply freedom from tolls or charges for the use of special facilities provided, but means simply "common to the citizens and subjects of both countries," "thrown open to the use and enjoyment of the citizens of both countries on equal terms," or in other words, "open without discrimination to the citizens of each, without direct tax, impost or duty."

Appellant is a public service corporation. It is bound by Minnesota statutes and the Act of Congress to collect only "reasonable charges." These fall on everyone alike regardless of citizenship. Appellant is forbidden to discriminate. The improvements, under the allegations of the

complaint, do, in fact, make possible log driving, a thing which is otherwise impossible. The Treaty, therefore, does not apply.

The decision in the Clark case and in the court below is adverse to our claim. In thus holding, the court below relied upon *Rainy Lake Boom Corporation vs. Rainy River Lbr. Co.*, 27 Ont. Law Reports 131, and *Rainy Lake Boom Co. vs. Rainy River Co.*, 162 Fed. 287.

The two Rainy River cases are distinguishable and in no way controlling. They did not involve the question of whether tolls could be collected for the use of improvements to navigation made entirely within the territorial limits of the state, but rather involved the unauthorized extension by a Minnesota corporation of its booms from the Minnesota side across the International Boundary line in Rainy River into Canadian waters, and the catching and impounding there of Canadian timber floating down on the Canadian side of the river. No such question is here involved. Under the allegations of the complaint, appellant is operating strictly on its own side of the river and is seeking nothing other than reasonable charges for the use of facilities on the American side of the river made use of by appellee. Appellee in its driving brings its timber, in part, at least, across the boundary, and, as to such of it as was not directly brought across the boundary, makes use of appellant's improvements; for instance, the portion of the dams maintained by appellant, in order to secure flood tides to work its logs downstream.

Here again we have support for our claim from the Canadian Supreme Court in *Arrow River, Etc., Co. vs. Pigeon Timber Co., Ltd., supra*. Chief Justice Anglin, concurring in the reversal of the lower court, after quoting the Treaty provision, says:

"It was merely intended to ensure to the citizens of both countries equality of rights in regard to the water communication, portages, etc., and * * * it never was intended thereby to provide that, in no event, should either party to the Treaty be at liberty, as regards citizens of its own nationality, to impose tolls for the use of improvements lawfully to be made thereon. In other words, where either party to the Treaty saw fit to impose tolls upon its own citizens in regard to such improvements, it should be at liberty to impose like tolls (but none greater) on citizens of the other country for the use of the improvements so made. Otherwise, it would follow that neither country could impose any tolls whatsoever upon its own citizens because that would interfere with the water communications, portages, etc., being 'free and open' to the use of the subjects of both countries."

Justices Lamont and Cannon, concurring in the reversal, disagree with the Chief Justice, however, holding:

"The meaning of these words in the clause is that the citizens of both countries are to be at liberty, as a matter of right, to travel these waters on both sides of the fixed boundary line without let or hindrance from anyone or having to pay anything for so doing. * * *"

The other two Justices do not determine this question of construction, that being unnecessary for their concurrence in the reversal.

Meaning of Term "Free and Open."

The words, "free and open," as applied to navigation and commerce is not a new thing in our history. Similar provisions are contained in various state Constitutions, Enabling Acts and the Ordinance creating the Northwest Territory. The phrase has been construed on several occasions, not only by this court but by several of our lower courts, and in each instance the construction for which we here contend has been placed upon the words.

Huse vs. Glover, 119 U. S. 543.

Sands vs. Manistee River Improvement Co., 123 U. S. 288.

Cardwell vs. American River Bridge Co.; 113 U. S. 210.

Hamilton vs. Vicksburg, 119 U. S. 280.

Williamette Iron Bridge Co. vs. Hatch, 125 U. S. 9.

Duluth Lbr. Co. vs. St. Louis Boom & Improvement Co., 17 Fed. 419.

Osborne vs. Knife Falls Boom Co., 32 Minn. 412 (21 N. W. 704).

In re Southern Wis. Power Co., 122 N. W. 801, 140 Wis. 245.

In *Huse vs. Glover*, *supra*, the claim was made that the Ordinance creating the Northwest Territory, providing that navigable waters should be highways and "forever free," "without any tax, impost or duty therefor," prevented the state of Illinois, through its Board of Canal Commissioners, from improving the Illinois River by the construction of locks and a dam and charging tolls therefor. In disposing of the objection, the court held:

> "The provision of the clause * * * has reference to navigation in their natural state. It did not con-

template that such navigation might not be improved by artificial means. * * * For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight and the taking of them on board."

In the *Sands Case, supra*, the state of Michigan chartered a boom company on the Manistee River with powers similar to those given the appellant in the instant case. The claim was made that this conflicted with the Ordinance creating the Northwest Territory, but the court, following *Huse vs. Glover*, held that it did not, and permitted the collection of tolls by the boom company.

The Cardwell case involved the California Organic Act, which provided that all navigable waters "shall be common highways and forever free as well to the inhabitants of the said state as to the citizens of the United States, without any tax, impost or duty therefor." This was construed as having but one object: "To insure a highway equally open to all without preference to any and unobstructed by duties or tolls, and thus preventing the use of the navigable streams by private parties to the exclusion of the public and the exaction of any toll for the navigation."

In *Williamette Bridge Co. vs. Hatch, supra*, this court similarly construed a like provision of the Enabling Act of Oregon.

"It does not refer to physical obstructions but to political regulations which would hamper the freedom of commerce. * * * What the people of the old states wished to secure was the free use of the streams and carrying places in the Northwest Territory as fully as it might be enjoyed by the inhabitants of that territory

themselves without any impost or discriminatory burden."

In the *Duluth Lumber Co. Case, supra*, the claim was made that a Minnesota boom company operating on the St. Louis River could not collect tolls for the use of its dams by reason of the Minnesota Organic Act, which provides that the navigable waters "shall be common highways and forever free as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll." The court held that this did not prevent the collection of such tolls.

In the Osborne case, also, involving a Minnesota boom company on the St. Louis River, and the claim that the Minnesota Enabling Act prohibited the collection of tolls for the use of dams constructed by it, the court held that it did not; that what was done was not to deprive the log drivers of the use of the river but to regulate its use for the common benefit. The charging of tolls was not for the use of the river but "to compensate the defendants for their outlay in erecting and maintaining the works which the Legislature has deemed proper to facilitate the common use of the stream."

In *In re Southern Wisconsin Power Co., supra*, construing the Wisconsin State Constitution, which provides that navigable waters "shall be common highways and forever free," the court held that this "does not refer to physical obstructions of these waters but refers to political regulations which would hamper the freedom of commerce."

Similar Provisions of Other Treaties.

The use of the words, "free and open," has not been an uncommon thing in the history of treaty making between this country and Great Britain.

The eighth article of the Treaty of Paris provides:

> "The navigation of the river Mississippi, from its source to the ocean, shall forever remain *free and open* to the subjects of Great Britain and the citizens of the United States." 8 Stat. 80.

This provision has never been superseded nor modified by any later treaty.

The Treaty of Washington (17 Stat. 863), ratified in 1871, provides, Article XXVI:

> "The navigation of the river St. Lawrence ascending and descending from the 45th parallel of north latitude where it ceases to form the boundary between the two countries, from, to and into the sea, shall forever remain *free and open* for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of *free navigation*.
>
> "The navigation of the rivers Yukon, Porcupine and Stikine ascending and descending from, to and into the sea, shall forever remain *free and open* for the purposes of commerce to the citizens of Her Britannic Majesty and to the citizens of the United States, subject to all laws and regulations of either country within its own territory not inconsistent with such privilege of *free navigation*."

If the words, "free and open," so restricts our govern-

ment that we cannot construct any improvements in aid of navigation upon these rivers wholly within our boundaries, nor collect tolls therefor, then we have surrendered away a surprising amount of control over our internal waterways. No such construction should be adopted if a less restrictive construction is possible; otherwise, as Anglin, C. J., said in the recent Arrow River case, "It would follow that neither country could impose any tolls whatsoever upon its own citizens, because that would interfere with the water communications * * * being 'free and open' to the use of the subjects and citizens of both countries."

A construction of the term, "*free and open*," as synonymous with "common" or "without discrimination" permits of the improvement of such waters in aid of navigation, and, if necessary or desirable, the collection of tolls to defray the expense thereof. Any other construction not only prevents this but actually requires that the stream be maintained in its original state.

A dam, for instance, is an obstruction to the "free and open" use of a river, if appellee's claim is correct. Any such provision in a treaty, therefore, has the effect, if construed as appellee claims, of surrendering up undoubted rights to create necessary obstructions or aids to navigation.

In the Treaty between the United States and Great Britain consenting to the construction of the Panama Canal (32 Stat. 1903), Article III provides:

> "The canal shall be *free and open* to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise."

Notwithstanding this provision, tolls are collected on the Panama Canal. Their collection is evidently not treated as a violation of the "free and open" provision of that Treaty.

It thus appears that the words, *"free and open,"* have, in every instance, been regarded as not inconsistent with the right, without discrimination on account of citizenship, to collect tolls, based on the benefit to navigation conferred by an improvement to navigation, and as only preventing political discrimination, and that the court below erred in not applying that construction to this Treaty.

Cognate Provisions of Webster-Ashburton Treaty.

Article VII provides:

> "The channels in the River St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channels in the River Detroit on both sides of the Island Bois Blanc, and between that island and both the American and Canadian shores; and all the several channels and passages between the various islands lying near the junction of the River St. Claire with the lake of that name shall be *equally free and open* to the ships, vessels and boats of both parties."

Appellee will, we apprehend, argue that the use of the modifying term, "equally," preceding the use of the words, "free and open," indicates an intended difference between that provision and the provision of Article II.

That this is not the case is apparent from the diplomatic correspondence and the President's message. The use of that term rather implies that the meaning of the phrase, "free and open," is as we argue.

President Tyler, in his message transmitting the Treaty to

the Senate for ratification (Senate Documents, Third Session, 27th Congress, Vol. I), with reference to this provision, says:

> "The Treaty made no provision for the *common* use of the waters by the citizens and subjects of both countries. * * * In these three cases, the Treaty provides that all the several passages and channels shall be *free and open* to the use of the citizens and subjects of both countries."

This construction by the Chief Executive, that the words, "free and open," are synonymous with "common," is persuasive of their proper construction.

Likewise, Lord Ashburton, in writing Mr. Webster on July 16, 1842, referring to their negotiations with reference to the rights given under this article, says:

> "We want a clause in our present Treaty to say that for a short distance, viz., from the upper end of Long Sault Island to the lower end of Barnhart's Island, the several channels of the river shall be used *in common* by the boatmen of the two countries."

Mr. Webster in his reply of July 27th agrees that these channels "shall be *severally free and open* to the vessels of both countries," and further "what has been agreed to also in respect to the *common use of certain passages* in the rivers and lakes as already stated must be made a matter of regular stipulation."

Ashburton on July 29th further wrote:

> "I cannot refuse the reciprocal claim made by you to *render common* the passage from Lake Erie into the Detroit River. This must be done by rendering the several passages in those parts *free* to both parties. I should remark also that the *free use* of the navigation

of the Long Sault passage on the St. Lawrence must be extended to below Barnhart's Island for the purpose of clearing those rapids."

"Free and open," "equally free and open," and "common," were, therefore, used synonymously in the drafting of this Treaty.

In Article III, relating to the use of the river St. John, the upper portion of which was wholly within the state of Maine, the middle portion of which formed the common boundary, and the lower portion of which was wholly within New Brunswick, the Treaty provides that the products of either country "shall have *free* access into and through the said river and its said tributaries," and then provides that when within the state of Maine, Canadian products shall have the same treatment as that accorded by Maine to its own products, and similarly while so within Canada, the products of Maine shall have the same treatment as that accorded by Canada to its own citizens.

Here again, the word, "*free*," is so employed as to imply only equality of treatment, rather than absolute freedom.

This is further evidenced by Ashburton's letter of July 11th, where he refers to "the right to use the St. John for floating down the lumber of Maine *on the same terms* as the river is used by the Queen's subjects," and likewise by Webster's letter of the 27th referring to the "right to use the waters of the St. John * * * *without subjection to any discriminatory toll or duty.*"

That this construction is correct is evidenced by the Root-Bryce Treaty of 1909 (36 Stat. 2448), wherein Article I of the Treaty provides:

"* * * The navigation of all navigable boundary waters shall forever *continue free and open* for the pur-

poses of commerce to the inhabitants and to the ships, vessels and boats of both countries *equally, subject, however, to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries.*

"It is further agreed that * * * *this same right of navigation shall extend* * * * *to all canals connecting boundary waters.* * * * *Either of the High Contracting Parties may charge tolls for the use thereof, but all such* * * * *tolls charged shall apply alike to the subjects or citizens of the High Contracting parties.* * * *"

We therefore submit that the maintenance of appellant's works and the collection of reasonable and non-discriminatory charges based entirely upon the benefit to the user of the improvements is not in any sense an interference with any *"free and open"* use of the river, and the lower court was in error in so holding.

VII.

IF THE TREATY FORBIDS APPELLANT'S WORKS AND COLLECTION OF TOLLS, IT IS SUPERSEDED BY THE ACT OF CONGRESS GIVING APPELLANT SUCH RIGHTS.

We have already argued the construction and effect of this statute (31 Stat. 1455). Appellant's works on the river were specifically authorized by the Act and appellant was permitted to collect reasonable charges for their use in the driving of timber not originating on the Reservation.

It is fundamental that treaty provisions and acts of Con-

gress are of equal rank and therefore that a later enactment will supersede inconsistent provisions of a former treaty.

Thomas vs. Gary, 169 U. S. 264.
Stephens vs. Cherokee Nation, 174 U. S. 445.
U. S. vs. Lee Yen Tai, 185 U. S. 213.
Johnson vs. Beonne, 205 U. S. 309.
Alvarez Y Sanchez vs. U. S., 216 U. S. 167.
Ex Parte Webb, 225 U. S. 663.
Rainy vs. U. S., 232 U. S. 310.
U. S. vs. Payne, 264 U. S. 446.

Obviously, the Treaty, if inconsistent with appellant's rights, is likewise inconsistent with this act of Congress and to the extent of such inconsistency is superseded by it.

Even though we are not sustained in either of our claims as to the construction of the Treaty, this Court must hold that as to such improvements as are authorized by this statute, we may collect tolls; hence, that the complaint states a cause of action for at least a portion, if not all, of the relief sought and it was therefore error for the lower court to sustain the judgment of dismissal.

VIII.

THE USE OF PIGEON RIVER IS NOW CONTROLLED BY THE ROOT-BRYCE TREATY OF 1909 WHICH IMPLIEDLY REPEALS THE WEBSTER-ASHBURTON TREATY IN SO FAR AS IT MAY APPLY TO PIGEON RIVER. THIS LATER TREATY PERMITS APPELLANT'S ACTS ALLEGED IN THE COMPLAINT.

A later treaty impliedly repeals a prior treaty save as to provisions not covered in the later one. As to such provisions, the earlier one still prevails.

Ross vs. McIntyre, 140 U. S. 453.

Where the later treaty covers the whole subject-matter it supersedes and impliedly repeals the former.

La Republique Francaise vs. Schultz, 57 Fed. 37.

This later treaty makes no mention of the use of various portages referred to in the prior treaty and therefore, as to the common use of such portages, there is no implied repeal.

It does, however, completely cover the subject of the use of boundary waters and therefore repeals the provisions of the prior treaty as to Pigeon River itself.

Its preamble recites that the two governments, "being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending * * * involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, * * * have resolved to conclude a treaty in furtherance of these ends."

Article III consents to the continuance of "the uses, obstructions and diversions heretofore permitted," and contains a proviso that the treaty provisions "are not intended to limit or interfere with other government works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line. * * *"

Root-Bryce Treaty, 36 Stat. 2448.

CONCLUSION.

There may be room for differences of opinion in the decision of the various questions presented on this appeal. This is evident from such differences of opinion as have existed in and between the various courts of the United States and Canada before whom this and allied cases have come.

The conclusion is clear, however, that for purposes of this appeal Pigeon River must be assumed to be non-navigable and therefore a cause of action was stated for the recovery of appellant's reasonable charges for appellee's use of its improvements because (1) this does not offend against the Commerce Clause; (2) it has valid authorization of the state of Minnesota, and, at least in part, of act of Congress, and (3) it is not forbidden by any treaty provision.

There should therefore be a reversal.

Respectfully submitted,

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APPENDIX.

Minnesota Statute Authorizing Appellant's Acts.

Chapter 221, General Laws, Minnesota, 1889.

"An Act to Amend Title One (1) of Chapter Thirty-four (34) of the General Statutes One Thousand Eight Hundred and Seventy-eight (1878), Relation to Corporations.

"Be it enacted by the Legislature of the State of Minnesota:

"Section 1. That section one (1) of title one (1) of chapter thirty-four (34) of the general statutes of eighteen hundred and seventy-eight (1878) be and the same is hereby amended by inserting before the word 'navigation' in the fourth (4th) line of said section the words 'or other.'

"Sec. 2. That said title one (1) of chapter thirty-four (34) be further amended by adding thereto the following: Any corporation formed under this title in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose, shall have power to improve such stream and its tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluice ways, booms of all kinds, side rolling, sluicing and flooding dams or otherwise if necessary, but shall in no case, in any manner, materially obstruct or impede navigation upon such stream or erect any dam or other obstruction below the head of steamboat navigation. Every such corporation which shall so improve a stream and so keep in repair, and operate its works so as to render driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber and timber driven, sluiced or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said streams, take charge of the same, and drive the same down and out of such stream, or down such stream so far as their improvements may extend, and charge and collect therefor of the owner or party controlling said logs and timber, reasonable charges and expenses for such services. And such corporation shall for all such tolls costs and expenses have a lien on the logs for which same was incurred, and may seize, in whoever possession found, and hold a sufficient amount thereof to pay the same,

and make sale thereof upon giving ten (10) days' notice in the manner provided for notifying sales on execution upon the judgment of justice of the peace, or may enforce such liens as other liens are enforced by proper proceedings for that purpose, or may ask, demand, sue for, collect and receive from the owner or owners of such logs the amount due for any such tolls. No injunctional order shall be granted to prevent the use or enjoyment of any such improvement, or abate any such dam necessary thereto unless such corporation shall fail for sixty (60) days after judgment, from which no appeal has been taken, to pay any damages recovered for any injury done by or in consequence of its works. Any corporation formed for the improvement of a stream, which is in whole or in part a boundary between this and an adjoining state, and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in a corporation or corporations in such adjoining state created for similar purposes upon the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining state, whenever the purposes for which the corporation in this state is organized can be better effected thereby. Provided, that no such purchase or consolidation or other union shall be made without the assent of holders of two-thirds (⅔) of the capital stock of such first (1st) named company. Provided, that all dams and other works erected under the authority given by this act shall be so constructed, used and operated as to facilitate and expedite the driving and handling logs and lumber upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined for points below its works on said stream except where dams have been constructed to accumulate water for sluicing logs and flushing the river below the same, and in such case shall not detain logs in any part of the river so as to form a jam or prevent the prompt delivery of logs destined for points below the works constructed under authority of this act.

"Sec. 3. The provisions of this act shall apply as well to corporations heretofore organized for the purposes specified in section two (2) of this act as to those hereafter organized for such purpose.

"Sec. 4. All acts and parts of acts in any manner conflicting with terms of this act are hereby repealed.

"Sec. 5. This act shall take effect and be in force from and after its passage."

(Approved April 24, 1889.)

Chapter 89, General Laws, Minnesota, 1905.

"An act to amend section 2 of chapter 221 of the General Laws of Minnesota for 1889, entitled 'An act to amend title one (1) of chapter thirty-four (34) of the General Statutes One Thousand Eight Hundred and Seventy-eight (1878), relating to corporations.'

"Be it enacted by the Legislature of the State of Minnesota:

"Section 1. That section 2 of chapter 221 of the General Laws of Minnesota for 1889 entitled 'An act to amend title one (1) of chapter thirty-four (34) of the General Statutes One Thousand Eight Hundred and Seventy-eight (1878), relating to corporations' is hereby amended so that the same shall read as follows:

"That said title one (1) of chapter thirty-four (34) be further amended by adding thereto the following: Any corporation formed under this title, in whole or in part, for the improvement of any stream or streams and driving or handling logs therein which shall have taken prior possession of such stream or streams, or any considerable portion thereof, upon which portion no other corporation organized for the purpose above mentioned has taken possession or has made improvements in aid of driving logs or of driving or handling therein, shall have power to improve such stream or streams and their tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, side rolling sluicing and flooding dams, or otherwise, as may be necessary; and may acquire any and all dams, booms, structures and works already erected by any person or persons, and also all necessary rights of way, shore rights, land and lands under water, by purchase or by any of the methods provided in this title; but such corporation shall in no case in any manner materially obstruct or impede steamboat navigation, or driving or handling logs.

"It shall be the duty of every such corporation to serve the public equally and reasonably, and for a reasonable compensation. Every such corporation which shall so improve a stream and so keep in repair and operate its works so as to render driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber and timber driven, sluiced or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said stream, take charge of the same and drive the same down and out of such stream, or down such stream so far as their improvements may extend and charge and collect therefor of the owner or party controlling said logs and timber reasonable charges and expenses for such services. And such corporation shall for all such tolls, costs and expenses have a lien on the logs for

which the same was incurred, and may seize in whosoever possession found and hold a sufficient amount thereof, to pay the same, and make sale thereof upon giving ten (10) days' notice in the manner provided for notifying sales on execution upon the judgment of justice of the peace, or may enforce such liens as other liens are enforced by proper proceedings for that purpose, or may ask, demand, sue for, collect and receive from the owner or owners of such logs the amount due for any such tolls. No injunctional order shall be granted to prevent the use or enjoyment of any such improvement or abate any such dam necessary thereto, unless such corporation shall fail for sixty (60) days after judgment, from which no appeal has been taken, to pay any damages recovered for any injury done by or in consequence of its works. Any corporation formed for the improvement of a stream, which is in whole or in part a boundary between this and an adjoining state or country and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in corporation or corporations in such adjoining state or country created for similar purposes upon the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining state or country, whenever the purposes for which the corporation in this state is organized can be better effected thereby. Provided, that no such purchase or consolidation or other union shall be made without the consent of holders of two-thirds (⅔) of the capital stock of such first (1st) named company. Provided, that all dams and other works erected under the authority given by this act shall be so constructed, used and operated as to facilitate and expedite the driving and handling logs and lumber upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined for points below its works on said stream except where dams have been constructed to accumulate water for sluicing logs and flushing the river below the same, and in such case shall not detain logs in any part of the river so as to form a jam or prevent the prompt delivery of logs destined for points below the works constructed under authority of this act.

"Sec. 2. Nothing in this act contained shall effect any action or proceeding now pending in any court of this state.

"Sec. 3. This act shall take effect and be in force from and after its passage."

(Approved March 29, 1905.)

Federal Authority Authorizing Appellant's Acts.

ACT, MARCH 3, 1901. 31 U. S. ST. AT LARGE, 1455.

"Chapter 878—An Act to authorize the Pigeon River Improvement, Slide & Boom Company, of Minnesota, to enter upon the Grand Portage Indian Reservation, and improve the Pigeon River in said State at what is known as the cascades of said river.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Pigeon River Improvement, Slide & Boom Company, a corporation organized and existing under the laws of the State of Minnesota, be, and hereby is authorized, under such rules and regulations and subject to such conditions and limitations as the Secretary of the Interior may prescribe, to enter upon and improve the Pigeon River at what is known as the cascades of said river, for the purpose of making said river at said point navigable for floating logs, and to that end to enter upon the unallotted lands, and with the consent of the allottees upon any allotted lands, adjacent to said cascades, of the Grand Portage Indian Reservation, in said state, and to construct such sluice dams, wing dams, bulkheads, spill dams, and other works necessary for said purpose, and to take from said unallotted lands timber for the construction of said improvements and works in quantity not to exceed one hundred and twenty-five thousand feet, board measure, for which timber said company shall pay such price as may be agreed upon between said company and the Secretary of the Interior, but not less than five dollars per thousand feet, board measure, the proceeds to be placed in the Treasury of the United States to the credit of the Chippewa Indians in Minnesota; Provided, That said river after being so improved shall be open at all times to the free passage of all timber cut from said Grand Portage Indian Reservation, and to the passage of all other timber for a reasonable charge therefor; Provided further that suitable fishways shall be constructed and maintained by said company, to be approved by the United States Fish Commission."

(Approved March 3, 1901.)

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 126.

PIGEON RIVER IMPROVEMENT, SLIDE & BOOM COMPANY,
Appellant,

vs.

CHARLES W. COX, LIMITED,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLEE'S BRIEF.

STATEMENT OF CASE.

The plaintiff (appellant) was organized under the laws of Minnesota, as a slide and boom company, for the improvement of Pigeon River. Pigeon River divides the State of Minnesota and the Province of Ontario, at the northeast corner of Minnesota. This river was made the international boundary between the United States and Canada by the Webster-Ashburton Treaty ratified August 22nd, 1842 (8 U. S. Stat. 572).

The plaintiff claims that it improved Pigeon River; that its improvements aid in driving forest products down the

river; that it is entitled to tolls on pulpwood belonging to defendant, which floated down the river; and that it has a lien for such tolls on the timber floating down the river and may seize said timber and sell the same to enforce its lien.

The defendant (appellee) is a Canadian timber dealer. The wood involved was cut from Canadian lands. It was put into Arrow River in Canada and floated into the Pigeon River on its way to Lake Superior and Canadian Mills.

The questions involved were decided by the Circuit Court of Appeals in the case of *Clark vs. Pigeon River Improvement, Slide & Boom Company*, 52 Fed. (2d) 550. After that decision was filed the plaintiff amended its complaint in this case. The defendant demurred to the amended complaint. The District Court sustained the demurrer and entered judgment in favor of the defendant. From this judgment the plaintiff appealed to the Circuit Court of Appeals. The Circuit Court of Appeals (63 Fed. (2d) 567) adhered to its decision in the Clark case and affirmed the judgment of the District Court. This appeal followed.

The defendant throughout this litigation has claimed that the movement of its pulpwood on international boundary waters is foreign commerce over which the State of Minnesota has no control and that the collection of tolls on the Pigeon River would be a violation of the Webster-Ashburton Treaty.

In its amended complaint and in its assignments of error, the plaintiff relies solely upon authority granted to it by the State of Minnesota. It does not claim that it had any authority from the United States to improve Pigeon River or to collect tolls thereon.

In its brief, filed in this Court, the appellant, for the first time, also relies upon an Act of Congress (31 U. S. Stat. 1455, Chapter 878) and claims that this Act gives it author-

ity to collect tolls on appellee's pulpwood which moves into Pigeon River at a point below the cascades referred to in this act. The Act of Congress merely authorizes appellant, "under such rules and regulations and subject to such conditions and limitations as the Secretary of the Interior may prescribe" "to enter upon Grand Portage Indian Reservation and improve the Pigeon River at what is known as the cascades of said river for the purpose of making said river *at said point* navigable for floating logs."

It is not claimed, in the amended complaint, that the Secretary of the Interior did prescribe rules and regulations for improvement of Pigeon River at the point known as the cascades or elsewhere, or that any improvement was made under such rules or regulations.

Unless the Act of Congress above referred to, without averment showing appellant entitled to the benefits thereof, gives it such authority, the plaintiff has no authority from the United States or any department thereof.

TREATY PROVISIONS.

The Webster-Ashburton Treaty defines the boundary between Minnesota and Ontario as follows:

> "Through the middle of the sound between Ile Royale and the northwestern mainland, to the mouth of the Pigeon River, *and up said river* and through the North and South Fowl Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods; thence along the water communication to Lake Saisaginaga, and Lac du Bois Blanc, Lac la Croix, Little Vermilion Lake and Lake Namecan, and through the several small lakes, straits, or streams, connecting the lakes here mentioned, to that point in Lac La Pluie or Rainy

Lake, at the Chaudiere Falls, from which the commissioners traced the line to the most northwestern point of the Lake of the Woods."

After describing the boundary it is further provided:

"That all water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

MINNESOTA CAN NOT REGULATE FOREIGN COMMERCE.

The movement of forest products from Canada into and along Pigeon River is foreign commerce.

Practically the same question involved in this litigation was discussed by the Circuit Court of Appeals in *Rainy Lake River Boom Corporation vs. Rainy River Lumber Company,* 162 Fed. 287, in which this Court denied a petition for a writ of certiorari (212 U. S. 574). In the Rainy Lake case the Circuit Court considered the right of the plaintiff to collect tolls on the Rainy River, which is also a part of the boundary between Minnesota and Ontario. The Court, on page 292, said:

"As applied to this river, it is perhaps not too much to say that the term, 'state and interstate commerce,' has no exact relation. While logs were driven from points on the Minnesota side to other points on the same side, and some were destined beyond the limits of the state, and this was true of shipments on the Canadian side of the river, the commerce partook of the

character of foreign commerce, because citizens of the United States and their property necessarily come in contact with citizens and subjects of Great Britain and their property on an international highway, declared by treaty between the two countries to be free and open to the use of the subjects and citizens of each."

This statement was quoted with approval in the Clark case. And the Rainy River case and the Clark case were cited with approval in the decision of the Circuit Court of Appeals (63 Fed. (2d) 567) in this case.

It is well settled that the Government of the United States is the only authorized authority to regulate commerce with foreign nations. Section 8, Article I of the Constitution of the United States provides: "The Congress shall have power, to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Regardless of the fact that the Pigeon River is an international highway and that the movement of timber products on this river is foreign commerce, the State of Minnesota chartered the plaintiff company and attempted to give it power to improve this international boundary water and charge tolls upon Canadian timber driven, sluiced or floated on the same. The state also attempted to give to plaintiff a lien on the timber for such tolls and the right to seize and sell the timber to enforce such lien (Sections 7550-7552, *Mason's Minnesota Statutes,* 1927).

The pulpwood involved in this case is cut from Canadian soil, handled by Canadian labor and put into the Arrow River, which is an interior water course of the Dominion of Canada. The Arrow River flows into the Pigeon River on the Canadian side. The wood moves down the Arrow River into the Pigeon River and down the Pigeon River into Lake

Superior, on its way to Canadian mills. It does not come within the territorial limits of the United States.

The Appolon, 9 Wheat. 362.

The Pilot, 50 Fed. 437.

The Fame, Fed. Case No. 4634.

The Act of the Province of Ontario, under which the Arrow River and Tributaries Slide and Boom Company, Limited, is organized, has the same standing with reference to the Pigeon River as an Act of Congress would have with reference to that international boundary. An Act of the Legislature of the State of Minnesota, on account of the constitutional provisions giving to Congress the exclusive power to regulate foreign commerce and making treaties the supreme law of the land, has no such standing.

Arrow River Tributaries Slide and Boom Company, Limited, vs. Pigeon Timber Company, Limited, 1932 Canadian Supreme Court Report 495.

In the Clark case the Circuit Court of Appeals said:

"The other question is that of obstruction to foreign commerce by a corporation organized under the law of the State of Minnesota. By Article 1, Section 8 of the Constitution, Congress is given plenary power to regulate commerce with foreign nations, and the states cannot interfere therewith. There is no limitation to such power except as may be prescribed in the Constitution. The government of the United States is the only authority authorized to regulate commerce with foreign nations. *Buttfield vs. Stranahan,* 129 U. S. 470. States do not make treaties and can not by legislative act interfere with the proper observation of treaties nor destroy rights created thereby. It may well be inquired where the State of Minnesota acquired any authority

to burden commerce passing from one point in Canada down an international boundary to another point in Canada."

In the Rainy River case the Circuit Court of Appeals, on page 292, said:

> "This treaty, having been made under the authority of the United States, became 'the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.' Article VI, Const. United States. The right to the free and open use of this river by a citizen of Canada is not referable to any local regulation of a state of the United States that chances to be erected contiguous to the river, but it is established by said treaty."

After reviewing its decisions in the Rainy River case and the Clark case the Circuit Court of Appeals, in the decision in this case, said:

> "In the Clark case we considered the provisions of the Webster-Ashburton Treaty involved here, and went into the matter rather thoroughly, consulting the diplomatic correspondence between the authors of this treaty in order to throw light on the meaning of the terms employed. Our conclusion in the Clark case was against the theory advanced by appellant in this case, and we held that the movement of Canadian pulpwood on the Pigeon River was foreign commerce over which the State of Minnesota could exercise no control, and that the collection of tolls on the river under grant of a franchise by the State of Minnesota would be a violation of the Webster-Ashburton Treaty."

In reading the Canadian decision in the Arrow River case,

it is important to keep two things in mind: First: It is the law in Canada that where "a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are under our (Canadian) law enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject." In this respect the Canadian law differs from the law in the United States where, by an express provision of the Constitution, treaties are made the supreme law of the land and are enforced in all of the state and Federal courts. Second, "within the provincial area * * * the legislative competence of a provincial legislature is plenary and as ample as the imperial parliament in the plenitude of its power possessed, and could bestow." In this respect, also, the law in Canada differs from the law in the United States for the reason that the Government of the United States has the exclusive and absolute power to regulate foreign commerce and the state has no power to regulate or control such commerce, whereas, in Canada, there is no such limitation upon the power of the provincial legislature. In view of the fact that in British countries treaties are not binding on the individual subject in the absence of legislation sanctioning the provision of the treaty, the treaty does not impose any limitation upon the legislative power of the Legislature of the Province of Ontario.

An act of the Legislature of the State of Minnesota, on account of the constitutional provisions giving to Congress the exclusive power to regulate commerce and making treaties the supreme law of the land, has no such standing.

PIGEON RIVER A BOUNDARY WATER.

The Webster-Ashburton Treaty (Article II) sets forth that the international boundary line theretofore fixed by commissioners under the Treaty of Ghent terminates near the northeastern point of Isle Royale. The writers of the treaty fixed the line from this point as follows: "Through the middle of the sound between the Isle Royale and the Northwestern mainland, to the mouth of Pigeon River and *up the said river,* to and through the North and South Fowl Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods."

In making the St. John and St. Francis Rivers a part of the boundary, the writers of this treaty (Article I) said that the line shall run "up the middle of the main channel of the said River St. John, to the mouth of the River St. Francis; thence, up the middle of the channel of the said River St. Francis, and of the lakes through which it flows, to the outlet of the Lake Pohenagamook."

The treaty (Article I) also provides that the line shall run "to the head of Hall's stream; thence, down the middle of said stream."

We call attention to the fact that the Thalweg theory of boundary is adopted until the line reaches the mouth of the Pigeon River, then the river itself is designated as the boundary. This made the entire Pigeon River boundary waters.

At the time the act authorizing the people of Minnesota to form a state government (11 U. S. Stat., Chap. 60, Public Acts) was passed by Congress on February 26, 1867, the Webster-Ashburton Treaty was in full force and effect and has so remained ever since that time. This act, authorizing the people to form a state government, provides as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the inhabitants of that portion of the territory of Minnesota which is embraced within the following limits, to-wit: Beginning at the point in the center of the main channel of the Red River of the North, where the boundary line between the United States and the British Possessions crosses the same; thence up the main channel of said river to that of the Boix des Sioux River; thence (up) the main channel of said river to Lake Travers; thence up the center of said lake to the southern extremity thereof; thence in a direct line to the head of Big Stone lake; thence through its center to its outlet; thence by a due south line to the north line of the state of Iowa; thence east along the northern boundary of said state to the main channel of said river, and following the boundary line of the state of Wisconsin, until the same intersects the St. Louis River; thence down said river to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and British possessions; *thence up Pigeon River,* and following said dividing line to the place of beginning—be and they are hereby authorized to form for themselves a constitution and state government, by the name of the State of Minnesota, and to come into the Union on an equal footing with the original states, according to the federal constitution.

Sec. 2. And be it further enacted, That the said State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said state of Minnesota, so far as the same shall form a common boundary to said state and any other

state or states now or hereafter to be formed or bounded by the same; and said river and waters, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll, therefor."

This act makes the boundary of Minnesota the center of the main channel of the Red River of the North and adopts the line already established for the state of Wisconsin and the state of Iowa, but when the northern boundary is defined this language is used: *"Thence up Pigeon River,* and following said dividing line to the place of beginning."

In conferring jurisdiction upon the State of Minnesota, the act authorizing the State Government grants to the state "concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same. It does not grant to the State of Minnesota concurrent jurisdiction on waters which form a common boundary to said state and any foreign country bounded by the same.

It would seem from this that the act authorizing a state government recognizes the fact that, although the Pigeon River borders on the State of Minnesota, it has already, by the terms of the treaty, been designated an international highway over which the State of Minnesota has no jurisdiction.

ROOT-BRYCE TREATY.

In 1909 the United States and Great Britain entered into the Root-Bryce Treaty (36 U. S. Stat. 2448) and thereby made all waters along the line, from main shore to main shore, boundary waters and created an international commission to prevent disputes regarding the use of such boundary waters. Pigeon River, from main shore to main shore, had already been made such a boundary water by the Webster-Ashburton Treaty. The imaginary boundary line running close to the middle of the Pigeon River, shown on the maps attached to the amended complaint, was not established by the Webster-Ashburton Treaty but was fixed by a survey made under the direction of the international joint commission created by the Root-Bryce Treaty. This treaty does not authorize the collection of tolls by the appellant.

PIGEON RIVER A WATER COMMUNICATION.

A claim is made that the Pigeon River, from its mouth to Fort Charlotte is not a "water communication" within the meaning of the Webster-Ashburton Treaty, because it is claimed that this portion of the river was not actually used at the time the treaty was written. The Circuit Court of Appeals, in the Clark case said:

> "It certainly would not be a liberal interpretation of this treaty to hold that the parties intended only to preserve water communications and portages for fur traders operating in canoes. Such lack of any vision as to the future is inconceivable."

In support of its claim that Pigeon River, from Fort Charlotte to its mouth, is not a "water communication" the appellant refers to diplomatic correspondence leading up to the

signing of the treaty and also President Tyler's message submitting the treaty to the Senate. We submit that the treaty is not ambiguous; and that "water communications" includes all of the Pigeon River. But a casual review of the diplomatic correspondence, as well as the president's message, leads one to the conclusion that this correspondence supports the claim of appellee that the expression "water communications" includes all of the Pigeon River and does not support the claim of appellant that this expression does not include that part of Pigeon River from its mouth to Fort Charlotte.

DIPLOMATIC CORRESPONDENCE ON "WATER COMMUNICATIONS."

All of the diplomatic correspondence leading up to the signing of the Webster-Ashburton Treaty and also President Tyler's message submitting the Treaty to the Senate, is found in Senate Documents, Third Session, Twenty-seventh Congress, Volume One.

Figures in parentheses under this heading refer to pages in that publication.

We submit that the diplomatic correspondence supports the decisions of the Circuit Court of Appeals to the effect that it would "give the Treaty a narrow and apparently distorted construction," to hold that the expression "water communications" does not include that part of the Pigeon River from its mouth to Fort Charlotte.

Delafield had advised Webster (103) that "The Pigeon River is a continuous water course."

Webster had asked Ferguson (104) to "describe the Pigeon River, its estuary or bay at its mouth, its size, and the nature of its channels and current in the last five or ten miles of its course." Also, "What is the general nature of the

country between the mouth of Pigeon River and the Rainy Lake? Of what formation is it and how is its surface? And will any considerable portion of its area be fit for cultivation? Are its waters active and running streams, as in other parts of the United States, or are they dead lakes, swamps and morasses? If the latter be their general character, at what point as you proceed westward do the waters receive a more decided character as running streams?

Ferguson had advised Webster (105) that "as an agricultural district, this region will always be valueless. *The pine timber is of high growth*, equal for spars, perhaps, to the Norway pine, and may, perhaps, in time, find a market; but there are no alluvions, no arable lands, and the whole country may be described as one waste of rock and water."

We also call attention to the fact that commissioners representing the States of Maine and Massachusetts were invited to take part in the negotiations leading up to the signing of the treaty. This was because Maine and Massachusetts were to be asked to give up land claimed by those states to be within their territorial limits. The correspondence (78 to 99) between these commissioners and Daniel Webster is significant. From this correspondence, as well as the correspondence between Webster and Ashburton, it is clear that the right to be given the states to transport the produce of the forest down the River St. John was considered a valuable concession on the part of Great Britain.

It is certain that Webster and Ashburton knew that the "lumberers" transported the produce of the forest to market by floating and driving the same down the streams along which the timber grew. Reference to this is also found in the treaty itself (Article III) wherein it is provided that "the navigation of the said river shall be free and open to both parties and shall in no way be obstructed by either;

that all the produce of the forest * * * shall have free access into and through the said river and its tributaries * * * to and from the seaport at the mouth of said River St. John."

The framers of the treaty also knew that the timber along the Pigeon River was of high growth which would eventually find a market; that this timber could not be transported over Grand Portage from Fort Charlotte to Lake Superior or over the portages along the line; that the country was a waste of rock and water valueless for agriculture; and that the Pigeon River was a continuous water course. Webster and Ashburton knew that the only way to get this timber to market was by driving it down the Pigeon River. And they provided that the water communications should be free and open to the use of the citizens and subjects of both countries.

Isn't it true that the appellant "imputes a want of vision to the framers of the treaty" when they contend that these wise statesmen made provision for the travel of fur traders only and that they entirely ignored the probability that the Pigeon River would be used to transport to market the produce of the forest in the same way that such "navigation" was carried on along the northeastern boundary waters? Why did Webster want to know if Pigeon River was a running stream or a dead swamp? Why did he not accept Ashburton's proposition (57) that the Grand Portage route be made the boundary? He knew that the land was valueless except for timber growing thereon (105). He inquired from Ferguson about the bay at the mouth of the Pigeon River, about the nature of the channel and current in the last five or ten miles of its course and whether its waters were active or dead lakes, swamps and morasses; and, if the latter, at what point westward "do the waters receive

a more decided character as running streams"? If Pigeon River were not a continuous running stream, Webster might have agreed to accept Ashburton's proposition to make the Grand Portage route the boundary. But he was not willing to place the American timber dealers in the same position in which the timber dealers of Maine were in, without an outlet for the produce of the forest. If the Grand Portage route had been accepted by Webster, the Pigeon River from Fort Charlotte to its mouth would have been in British territory just the same as the River St. John was in British territory. Webster had been advised by the commissioners of Maine (87) that "while they (British) had a supply of their own, the right of carrying down our lumber was most strenuously and pertinaciously resisted," and that the Maine timber dealers, in order to get their timber to market, had to dig "a channel across the range of British highlands." So Webster rejected the Grand Portage route and the Pigeon River was made the boundary "free and open" to the use of the citizens and subjects of both countries.

The Pigeon River was not made free to ships, boats and vessels only. It was not made free for travel alone. It was made free for whatever use the citizens and subjects of both countries might find it useful at any time in the future. It is made a perpetual privilege, as was the privilege "perpetual in its terms" on the River St. John. This expression was used by President Tyler (20).

The very word "communication," is used in the correspondence. Lord Ashburton (43-44) wrote in the course of this correspondence, "Important anxiety has been expressed that Maine should be assured of some means of communication by the St. Johns, more especially for the conveyance of her lumber." It is common knowledge that the word, "lumber," at the time this treaty was written and for years thereafter,

was used with reference to all forest products. A "communication for the conveyance of lumber" could refer to only one thing, to-wit: A river or other water communication which might be used for floating and driving logs and other forest products. No other communication for conveyance of timber out of the wilderness was known to the framers of the treaty.

In view of the fact that Webster and Ashburton were writing and talking to each other about "communications for the conveyance of timber," can it be said that these men, in making "water communications" free and open, referred only to the travel of fur traders? Why didn't they say that the fur traders would have the right to pass over the water communications and portages without subjection to any discriminating toll? They did say that the channels in the River St. Lawrence shall be free and open to the boats, ships and vessels, and, referring to communications for conveyance of timber, they used the language, "water communications shall be free and open to the use of the citizens and subjects of both countries."

On this point, we also call attention to the very convincing argument of Justice Lamont of the Supreme Court of Canada in the opinion written by him in the Arrow River case:

> "In construing the treaty we have to determine the intentions of the framers thereof as expressed in the words used. Did they intend that the whole river should come within the term, 'water communications,' or only those parts of it between portages over which boats could pass at the date of the treaty? In order to understand these words it is material to inquire what was the subject-matter with respect to which they were used, and the object the framers of the treaty had in view? The subject-matter to which they were applied

was the waters of the Pigeon River, and other rivers, streams and lakes up which the boundary line from Lake Superior to the Lake of the Woods was being run. The objects of the provision was to secure to the subjects of both countries the free and untrammeled right to use these water stretches irrespective of whether they were on one side of the boundary line or the other.

Although at the date of the treaty the chief purpose for which these water communications were being used was the transportation by boat or canoe of persons and goods, the clause in question places no limit on the purposes for which they might be used. They are to be 'free and open' to the people of both countries for whatever purpose they may desire to use them as a water communication. If, therefore, they could be used for any purpose which did not necessitate the making of a portage to get past a point of danger, I see nothing in the clause, or in any other part of the treaty, which would compel the use of the portage in order to have a free passage. To hold that water communications should be limited to those portions of the river navigable by boats at the time the treaty was signed, would, in my opinion, be to give too narrow a construction to the language used, and to impute a want of vision to the framers of the treaty.

Furthermore, such a construction would lead to the result that certain portions of the river around which portages had to be made at the date of the treaty owing to low water, would not constitute a water communication at another season when boats could pass over them with ease and safety."

The writers of this treaty knew what they were doing

when they used the expression, "water communications." The right to float timber products down the St. Francis River was one of the important concessions granted to the States of Maine and Massachusetts in order to get the consent of those states to the terms of a treaty, which awarded to Great Britain territory claimed by Maine and Massachusetts. The timber business was already an important industry and had been important to the inhabitants of Maine, Massachusetts, New Hampshire and the Provinces on the Canadian side.

It is inconceivable that Webster and Ashburton, who were making provision for the free and open use of water communications, would agree upon a provision which would make necessary the carrying of forest products over portages along the line and also over Grand Portage. But if we adopt the interpretation that the water communichtions and the portages were made free and open for travel only, the inevitable result is that the timber dealers must carry their logs along the same route which the fur traders followed in their canoes. The fact that the Pigeon River has falls or other obstacles which would make "navigation for the conveyance of timber" difficult, would not keep the framers of this treaty from making the stream free and open for this purpose. They knew that timber dealers, in driving forest products to market, had to overcome obstacles in some of the streams. This was true, for instance, in the River St. Francis, regarding which the commissioners of Maine wrote to Daniel Webster (86): "The River St. Francis is one whose course is exceedingly crooked, having many sharp bends, so that while the distance by the river and lakes from the Grand Portage to the mouth of the St. Francis is estimated by the assistant geologist of Massachusetts, who followed it down its whole length, at not less than eighty-five

miles, the distance from the one point to the other in a straight line is only about forty miles." Reference is here made to another "Grand Portage." The River St. Francis was used for driving forest products even along those places where navigation by boat would have to pass over portages along the line. The forest products growing in the upper reaches of the River St. John floated down that river to the seaport at the mouth of the river. Hall's Creek was used for floating and driving the produce of the forest and of agriculture. Did Lord Ashburton and Daniel Webster, knowing all of this, intend to provide that the produce of the forest, in logs, lumber, timber, boards, staves or shingles, or of agriculture, would have to be carried across Grand Portage from Fort Charlotte to Lake Superior? This is a distance of nine miles over which supplies and furs were carried on the backs of human beings. It would have been impossible, of course, to move the timber out of the forest in this way. Did they not have in mind that the water communications forming the boundary at this point might be used for floating and driving the produce of the forest and of agriculture, the same as the streams in the vicinity of the northeastern boundary and streams in other parts of the United States and Canada were used at that time? To hold otherwise would "impute a want of vision to the framers of the treaty."

We respectfully submit that the expression, "water communications," includes the whole of the Pigeon River.

PIGEON RIVER FREE AND OPEN.

The appellant claims that "free and open" should be construed to mean "thrown open to the use of the citizens of both countries on equal terms" and that this expression is not inconsistent with the imposition of tolls. The language of the treaty, however, seems to be clear enough and it is hardly necessary to resort to correspondence between Webster and Ashburton in order to determine what it means. It means that the citizens and subjects of both countries have a right to use the Pigeon River without interference and without paying for so doing.

In the Clark case, the Circuit Court of Appeals, in discussing the decision in the Rainy River case, said:

> "The Court discussed this article of the treaty we are considering and pointed out that the right to the free and open use of the river under the treaty by a citizen of Canada can not be limited by local regulations of a state. Its view of the free use of a stream was exempt from duties imposed or exacted by either of the countries to the compact."

In the Rainy River case, the Circuit Court of Appeals said:

> "The language of the treaty in question is not only that this water communication shall be free to the use, but also open to the subjects and citizens of both countries; that is to say, it shall not be closed or otherwise so obstructed by either country as to prevent its *free and equal use.*"

Other provisions of the treaty itself support this construction. Article VII of the treaty provides as follows:

> "VII. It is further agreed that the channels in the

River St. Lawrence on both sides of the Long Sault Island and of Barnhart Island, the channels in the River Detroit, on both sides of the Island Bois Blanc, and between that Island and both the Canadian and American shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair with the lake of that name shall be equally *free and open* to the ships, vessels and boats of both parties."

Did the writers of the treaty intend to say that the ships, vessels and boats of both parties might navigate the channels of the River St. Lawrence only upon payment of tolls imposed by the State of New York or the Province of Ontario? This seems to be a distorted construction of the plain words of the treaty. The natural and ordinary meaning of the words, "free and open," is that the owners of the boats, ships and vessels have a right to use the channels of the St. Lawrence without paying for so doing.

Article III of the treaty provides that the navigation of the River St. John shall be free and open to both parties, "provided, always, that this agreement shall give no right to either party to interfere with any regulations not inconsistent with the terms of this treaty which the governments, respectively, of Maine or of New Brunswick may make respecting the navigation of the said river, where both banks thereof shall belong to the same party."

It is significant that the writers of the treaty provided specifically that Maine or New Brunswick may enforce regulations respecting navigation of the River St. John, where both banks of the river belong to that state or province. Where both banks belong to Maine the river is an interior water rather than a boundary water and, at this point, the

river, perhaps, is not free and open to the citizens and subjects of both countries but may be subject to regulations respecting the use of the river.

On this point, also, we have a very convincing argument from Justice Lamont of the Canadian court, in the opinion written by him in the Arrow River case:

> "I can not agree with the appellant's contention that the words, 'free and open,' in the last clause of article 2, are consistent with the imposition of tolls for the use of improvements erected in the river. In my opinion the meaning of these words in the clause is that the citizens of both countries are to be at liberty, as a matter of right, to travel these waters on both sides of the fixed boundary line without let or hindrance from anyone, or having to pay anything for so doing. This seems to me to be the natural and ordinary meaning of the words and the meaning which, at the time of the treaty, the subjects of both countries would place upon them. That this is the meaning the words were intended to bear seems to me to be indicated also by article 7 of the treaty, which reads:
>
> 'VII. It is further agreed that the channels in the River St. Lawrence on both sides of the Long Sault Island and of Barnhart Island, the channels in the River Detroit, on both sides of the Island Bois Blanc, and between that island and both the Canadian and American shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair with the lake of that name shall be equally free and open to the ships, vessels and boats of both parties.'

If we give effect to the appellant's interpretation of the words, "free and open," it would entitle either of the

contracting parties who improved the navigation of any of the channels on its own side of these waters to levy a toll on every vessel making use of such channel. I can not believe such to have been the intention of the parties. As Riddel, J. A., pointed out in his judgment below, the appellants hereby building upon the bed of the river had interfered with the enjoyment of the free and open use of it by the citizens of the United States. This, as I read it, is contrary to the treaty."

DIPLOMATIC CORRESPONDENCE ON "FREE AND OPEN."

Here, again, figures in parentheses refer to pages in Senate Documents, 3rd Session, 27th Congress, Volume 1.

Webster had written Ashburton (61) that "When the proposed line shall be properly described in the treaty, the grant by England of the right to use the waters of the River St. John for the purpose of transporting to the mouth of that river all the timber and agricultural products raised in Maine * * * without subjection to any discriminating toll, duty or disability is to be inserted."

The commissioners representing the States of Maine and Massachusetts (87) thought that the free navigation, including the driving of the products of the forest, to be as advantageous to the British as it was to the Americans.

When the Commissioners, representing the State of Massachusetts, finally consented to the treaty (93), they did so with the understanding that "The right to the free navigation of the River St. John shall include the right to the free transportation thereupon of all products of the soil as well as the forest."

When the Commissioners representing the State of Maine,

finally consented to the treaty (98-99), they did so with the understanding that "the right of free navigation of the St. John, as set forth in the proposition of Mr. Webster's on the part of the United States, shall extend to and include the products of the soil, in the same manner as the products of the forest; and that no toll, tax or duty be levied upon timber coming from the territory of Maine."

Webster, in writing to Ashburton, had used the expression (61), "Without subjection to any discriminating toll, duty or disability." And in one of his letters to the commissioners of Maine (82), referred to the use of the River St. John for the conveyance of timber "free from all discriminating tolls, impositions or inabilities of any kind, the timber enjoying all the privileges of British Colonial timber." Ashburton had used the expression (55), "The right to use the St. John for floating down the lumber of Maine, on the same terms as the river is used by the Queen's subjects."

We must assume, therefore, that Ashburton and Webster knew how to express themselves, and, if they wanted to say that the water communications would be "thrown open to the use of the citizens of both countries on equal terms without discrimination," they would have used suitable language to express this meaning. It would only have been necessary for them to use the same expressions which they had used in their correspondence. The right to use the river "on the same terms as the river is used by the Queen's subjects," would express this meaning. The right to use the waters for the purpose of transporting timber "without subjection to any discriminating toll, duty or disability" would express this meaning. These expressions, if incorporated into the Treaty, would support the argument of appellant, that the agreement was for equal treatment on the river.

But the commissioners representing the States of Maine

and Massachusetts were not satisfied with freedom from discriminating tolls, nor were they satisfied with the use of the river on the same terms as the river was used by the Queen's subjects. They insisted that no toll, tax or duty be levied upon timber floating down the river. And when the Treaty was finally written, the words, "without discriminating tolls," or "on the same terms as the river is used by the Queen's subjects," were not incorporated therein. The language used in the treaty (Article III) was that "the navigation of the said river shall be free and open to both parties." And so far as the boundary between Lake Superior and Lake of the Woods is concerned, the treaty provided that the water communications shall be free and open to the use of the citizens and subjects of both countries.

Now, in view of the fact that "discriminating tolls" and "on the same terms as the river is used by the Queen's subjects" had already been discussed, it is inconceivable that the framers of the treaty, by the omission of any such language, intended to provide that no charge of any kind should be levied upon timber floating down the river.

Webster wrote to Ashburton (45), "that if one element or one part in the description be uncertain, it is to be explained by others which are certain, if there be such others," and again (46), "what may be doubtful in itself, may be made certain by other things which are certain." These were correct statements of the rule to be applied at the time and they are still correct statements of the law.

The claim that the water communications are free of all charges is also supported by the provision in the treaty and the correspondence relating to the use of boundary waters for ships, boats and vessels.

Ashburton (57) called attention to the fact that, at the head of Lake St. Clair and at St. Regis on the River St.

Lawrence, the channels on the American side are best for navigation and said: "We want a clause in our present treaty to say that * * * the several channels of the river shall be used in common by the boatmen of the two countries."

In Webster's answer to Ashburton (58), he said: "You have suggested * * * that boats belonging to Her Majesty's subjects may pass the Falls of the Long Sault in the St. Lawrence on either side of the Long Sault Islands and that the passages between the islands lying at or near the junction of the River St. Clair, with the lake of that name, shall be severally free and open to the vessels of both countries. There appears no reasonable objection to what is requested in these particulars; and on the part of the United States it is desirable that their vessels, in proceeding from Lake Erie into the Detroit River, should have the privilege of passing Bois Blanc, an island belonging to England, and the Canadian shore, the deeper and better channel being on that side."

Ashburton's reply to Webster (62) contained the following: "The stipulations for the greater facility of the navigation of the River St. Lawrence, and of two passages between the upper lakes, appear evidently desirable for general accommodation, and I can not refuse the reciprocal claim made by you to render common the passage from Lake Erie into the Detroit River. This must be done by declaring the several passages in those parts free to both parties. The language finally adopted was (Article VII): "It is further agreed that the channels * * * shall be equally free and open to the ships, vessels and boats of both parties."

President Tyler also said (20) that the privilege of transporting timber on the waters of the River St. John shall be "free from imposition or disability" and (21) that the chan-

nels shall be "free and open." He did not refer to equal treatment or without discriminating tolls. And the record indicates that President Tyler and Webster and Ashburton and also the commissioners from Maine and Massachusetts had a command of the English language which made it possible for them to write clearly the ideas which they wanted to express. If it had been the intention that no discriminating tolls were to be levied, the treaty would have so stated.

APPELLANT'S AUTHORITIES ON "FREE AND OPEN."

In its brief the appellant calls attention to that line of cases, such as *Huse vs. Glover*, 119 U. S. 543, in which this Court has held that reasonable charges for the use of property is not an interference with that freedom of transportation between states which is secured under the commerce clause. None of these cases, so far as we have found, deal with the improvement of international waters under state authority and without sanction of the Federal Government. In those cases, reliance is placed upon the jurisdiction of the state over a stream entirely within its boundaries or upon the concurrent jurisdiction on streams which form the boundaries between the states.

This line of cases was before the Court in the Rainy River case. The Court quoted from the case of *Huse vs. Glover*, 119 U. S. 543, also from the case of *Osborn vs. Knife Falls Boom Corporation*, 32 Minn. 412, also from the case of *Cardwell vs. American River Bridge Company*, 113 U. S. 210. The case of *Willamet Iron Bridge Company vs. Hatch*, 25 U. S. 9, was also referred to in the Rainy River decision.

The Court in discussing this line of authorities called attention to the fact that any action of a state which has been

upheld is based entirely upon the state's jurisdiction over its internal domestic affairs. It quotes from the Osborn case that part of the decision which relates to the necessity that the Legislature of a state determine how the common highways within that state shall be enjoyed. After fully considering this line of authorities, the Court was of the opinion that the State of Minnesota has no jurisdiction on an international highway and no control over foreign commerce on such a highway.

CANADIAN DECISION.

We have already referred to the Arrow River case decided in the Supreme Court of Canada, 1932, Supreme Court Reports 495.

We have pointed out that, in considering this decision, it is important to keep in mind that treaties in British countries are not "the supreme law of the land" unless sanctioned by legislation. We have also pointed out that an Act of the Legislature of Ontario regulating foreign commerce, has the same standing in that Province and in the Dominion of Canada as an Act of the Federal Government has in the United States.

We have quoted from the opinion of Justice Lamont of the Supreme Court of Canada in the Arrow River case, as to the meaning of "water communications" and "free and open." It seems to us that the reasoning of Justice Lamont of the Canadian Court supplements what was said by the Circuit Court of Appeals and that the reasoning is irrefutable.

A careful reading of this Canadian decision will reveal that the real reason for the reversal of the Ontario decision was that the provisions of the Webster-Ashburton Treaty

have not been sanctioned by legislation and will not, therefore, be enforced in the Canadian Courts. It seems that, in British countries, a treaty must be enforced through diplomatic channels, until the treaty has been sanctioned by legislation.

In addition to this, the Supreme Court of Canada points out that the Legislature of Ontario has plenary power and that there is no restriction on its control over foreign commerce.

The argument relied upon by the appellant is that "free and open" does not mean freedom from tolls. The appellant has, on this point, the support of only one of the Canadian Justices. Chief Justice Anglin said: "I should, however, have preferred it had the majority of the Court seen its way clear to base its decision upon a holding that upon the true construction of the clause of the Ashburton Treaty * * * it was merely meant to ensure to the citizens of both countries equality of rights in regard to water communications, portages, etc."

Apparently this construction of the treaty was urged upon the Supreme Court of Canada but that Court refused to adopt it. Chief Justice Anglin favored it. No other member of the Court agreed with him.

Justice Smith of the Canadian Court wrote an opinion in which he said that he could see no reason for preserving a right to use the Pigeon River for any purpose for which it was not used by the fur traders. He seems to have overlooked what President Tyler had so clearly in mind, that the framers of the treaty were writing an agreement which was to be "perpetual in its terms" (Senate Documents, Third Session, 37th Congress, Vol. I, page 20). An examination of the briefs filed with the Canadian Court, indicates

that the important consideration given by the framers of the treaty to the right to drive timber on the water courses along the northeastern boundary, was not called to the attention of the Court; that the Court did not know that Lord Ashburton, in a letter to Daniel Webster, had referred to a "communication for the conveyance of lumber"; that the Court did not consider the fact that Webster and Ashburton knew of the "pine timber of high growth" along the Pigeon River which was likely "to find a market"; and that they also knew that the Pigeon River is a continuous water course, similar to the streams in other parts of the United States and Canada which were then used for transportation of timber products.

Although the meaning of the expression, "free and open," must have been fully discussed by the Court, Justice Smith and Justice Rinfret, who concurred in his opinion, refused to hold that this expression merely referred to an equality of rights on the water communications. Apparently four of the members of the Supreme Court of Canada agree with the view of the Circuit Court of Appeals that "the free use of a stream was exemption of duties imposed or exacted by either of the countries to the compact."

"AS NOW ACTUALLY USED" APPLIES ONLY TO GRAND PORTAGE.

In the Clark case the Circuit Court of Appeals said:

> "Appellee's theory is that the words of the article 'as now actually used' limit water communications and the usual portages to such traffic as they were used for at that time, *i. e.*, as a fur trader's route, and have no reference to the floating of logs, and do not impair the power of the State of Minnesota to permit the collec-

tion of proper tolls and charges for benefits conferred upon the users of appellee's improvements. As a matter of grammatical construction an argument might be made that the term, 'as now actually used,' applies to all the water connections and early portages and not merely to Grand Portage, but it appears from the record that Grand Portage alone of all the portages is not 'along the line' and we think therefore the words, 'as now actually used,' refer only to Grand Portage. Any other theory would give the treaty a narrow and apparently distorted construction. Good faith between nations requires carrying out treaty obligations according to the intentions of the contracting parties."

In the Arrow River case, two of the Justices of the Canadian Court (Smith and Rinfret) "are unable to agree with the view expressed by the Circuit Court of Appeals" that the words "as now actually used" apply only to Grand Portage. They therefore, reached the conclusion that "water communications" does not include that part of Pigeon River between its mouth and Fort Charlotte. In the Clark case, the Circuit Court of Appeals pointed out that such a construction imputes a want of vision to the framers of the treaty and is not the liberal interpretation which the United States law demands. The opinion of the Supreme Court of Canada in the Arrow River case was before the Circuit Court of Appeals in this case. This caused the Circuit Court of Appeals to review its former decision very carefully but the Court could not place a different construction upon the treaty provisions.

After reading the entire record, including the correspondence and the treaty itself, one must come to the conclusion that Webster and Ashburton would hardly say that the

usual portages along the line as now actually used, are to be free and open. They would and did say that "all water communications and all the usual portages along the line" are to be free and open. They also made "Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used," free and open.

Grand Portage is the only portage which is not "along the line." This is clear from an examination of the maps which are attached to the amended complaint. The appellant's claim that a portage which may run back from the river a quarter of a mile is not "along the line" merely emphasizes the fact that Grand Portage is the only portage which is not "along the line."

The reasoning contained in the opinion written by Justice Smith does not have the same convincing force as the reasoning contained in the opinion written by Justice Lamont, which was concurred in by Justice Cannon. These Justices (Lamont and Cannon) adopt the conclusions of the Circuit Court of Appeals in the Clark case and add "another and practical reason" why Grand Portage was the only portage limited by the words, "as now actually used." They say that all of the portages along the line were followed to get around parts of the river over which it was dangerous to take boats; that practical traders, traveling along the river, would always find and take these advantageous portages around the obstacles in the river; while Grand Portage was a land strip of nine miles over which several routes might be established and it was desirable that the Grand Portage route be specifically defined so that there would be no more than one route free and open for traffic, so far into American territory. This was done by limiting the Grand Portage route to the one actually used. The conclusion of these Justices (Lamont and Cannon) is that Pigeon River from

its mouth forms part of the "water communications" which were to be free and open.

We respectfully submit that the construction placed upon the expression, "water communications," by the Circuit Court of Appeals and by Justices Lamont and Cannon of the Canadian Court is the construction which a liberal interpretation of the treaty demands.

But, argues appellant, the Canadian company can not maintain its part of the works on the Canadian side, if the Minnesota company is prevented from maintaining its portion on the American side.

We submit that the only justification for the Canadian decision is that the provisions of the treaty will not be enforced in Canadian courts until the same are incorporated in an act of the Canadian Parliament or an act of the Ontario Legislature; and the further fact that an act of the Ontario Legislature authorizing improvement of the river and collection of tolls has the same standing as an Act of Congress would have in this country. In the United States, the treaty is the supreme law of the land and the Minnesota Legislature has no jurisdiction over international waters or foreign commerce. The liberal interpretation which we must apply demands the interpretation placed upon the provisions of the treaty by the Circuit Court of Appeals.

If the Pigeon River is to remain "free and open" as provided by the treaty, the Canadian company should not be permitted to collect tolls and particularly not on American timber which also goes down the Pigeon River to Lake Superior.

The argument, therefore, that this Court should reverse the Circuit Court of Appeals on account of the Canadian decision and to protect the Canadian company in the collec-

tion of tolls, is not very convincing, however desirable uniformity of decisions may be. We submit that it is of greater importance to have the decision of this court right than it is to have it follow the Canadian decision.

OTHER TREATIES.

The appellant calls attention to the use of the words, "free and open," in the Treaty of Paris and the Treaty of Washington. Counsel argue that the United States has surrendered a surprising amount of control over the Mississippi and that Canada has surrendered a surprising amount of control over the St. Lawrence, if our theory is correct.

It must be remembered that the Mississippi is not a boundary water. Neither is that part of the River St. Lawrence referred to in the Treaty of Washington a boundary water. These are interior waters. And the Treaty of Washington specifically provides that commerce on the St. Lawrence is subject to laws and regulations of Great Britain or Canada.

The Panama Canal Treaty is entirely different. It provides that the canal shall be free and open, "on terms of entire equality" so that there shall be "no discrimination" against any such nation in respect of "the conditions or charges of traffic." Here, we have incorporated in the treaty the same idea which Webster, in his correspondence with Ashburton, had in mind when he wrote, "without subjection to any discriminating toll, duty or disability." It is the same idea which Lord Ashburton described as follows: "On the same terms as the river is used by the Queen's subjects."

The fact that appropriate language is used to permit the collection of tolls where equal treatment is intended and that no such language is used where a river is "free and open to the use of the citizens and subjects of both countries," is the

strongest kind of an argument that the expression, "free and open," means exactly what the words imply.

PRESIDENT TYLER'S MESSAGE.

President Tyler, in his message to the Senate, did not use the word, "common," with reference to the use of channels under the Webster-Ashburton Treaty. In pointing out the weakness of the Treaty of Ghent and discussing the reasons why the provisions of that treaty brought about a difference which has "sometimes lead to great irritation" the President said that the Treaty of Ghent had made no provision for the common use of the waters by the citizens and subjects of both countries. Referring to the Webster-Ashburton Treaty, however, he said (Senate Documents, Third Session, 27th Congress, Vol. I, pp. 20-21): "The line of boundary, then, from the source of the St. Croix to the St. Lawrence, so far as Maine and Massachusetts are concerned, is fixed by their own consent, and for consideration satisfactory to them; and the chief of these considerations being the privilege of transporting the lumber and agricultural products growing and raised in Maine on the waters of St. Johns and its tributaries down that river to the ocean, free from imposition or disability. The importance of this privilege, perpetual in its terms, to a country covered at present by pine forests of great value, and much of it capable hereafter of agricultural improvement, is not a matter upon which the opinion of intelligent men is likely to be divided."

He also said (22), in referring to the channels in the Rivers St. Lawrence, Detroit and St. Clair, that "the treaty provides that all the several passages and channels shall be free and open to the use of the citizens and subjects of both countries."

This language does not support a claim that "free and open" and "common" are synonymous expressions. The President called attention to the fact that the failure to make provision for some common use of the boundary waters had led to differences and caused some irritation; but apparently was of the opinion that there would be no further disputes because the agreement did more than provide for the common use of the boundary waters, it provided that the passages and channels shall be free and open to the use of the citizens and subjects of both parties.

NAVIGABILITY.

It is the claim of appellee that navigability is not a controlling factor in this litigation.

In order to determine whether or not navigability is important, we must have in mind what waters were navigable at the time the Webster-Ashburton Treaty was written. We may assume that Daniel Webster and Lord Ashburton knew what was a navigable water. They did not say that *navigable waters* along the line between Lake Superior and Lake of the Woods shall be free and open. They said "all water communications and all the usual portages along the line" shall be free and open.

It appears that the expression, "water communications," was used advisedly. In Article 3 of the Webster-Ashburton Treaty it is provided that "navigation" of the River St. John between Maine and New Brunswick shall be free and open, subject to regulations which Maine and New Brunswick may make respecting navigation where both banks belong to the same party.

In Article 7 of the treaty, it is provided that the channels in the River St. Lawrence; and the channels in the River

Detroit, shall be free and open to the "ships, vessels and boats of both parties." But, in Article 2 of the treaty, with reference to the boundary between Lake Superior and Lake of the Woods, the parties did not say that navigation shall be free and open on the Pigeon River. They did not say that the channels of the Pigeon River shall be free and open to the ships, vessels and boats of both parties. But they did say that "all water communications and all the usual portages" shall be "free and open to the use of the citizens and subjects of both countries." This did not refer to nor was it intended to refer to navigable water. The expression used is more comprehensive than the provisions relating to some of the other waters along the line. The treaty made the Pigeon River a border stream free and open to the citizens and subjects of both countries, for whatever purpose this stream might be useful.

Under the common law of England, tide water and navigable water were synonymous terms. This Court followed the rule of the common law of England. And the tide water test of navigability was applied in both countries at the time the Webster-Ashburton Treaty was written. *The Genesee Chief*, 12 How. 443. *The Thomas Jefferson*, 10 Wheat. 428.

In the case cited, *The Genesee Chief*, decided in 1851, after the Webster-Ashburton Treaty was signed and approved, this Court overruled its earlier decisions and held that the English rule was not adaptable to this country and that the lakes and rivers in which there is no tide but which are—in fact—navigable, are also public navigable waters. But we must assume that Webster and Ashburton had in mind the doctrine of the common law of England, so far as navigability was concerned, because the tide water test was in effect at the time.

Since the case of *The Genesee Chief* this Court has extended the rule so that the definition of navigability in the United States Courts at the present time is as follows:

"That those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The Montello, 20 Wall. 430.
The Daniel Ball, 10 Wall. 557.
The Hine, 4 Wall. 555.

"The true test of navigability of a stream does not depend upon the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation."

"It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."

"The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so, the river is navigable in fact, although its navigation may be encom-

passed with difficulties by reason of natural barriers, such as rapids and sand bars."

The Montello, 20 Wall 430

The decisions in the cases just cited, as well as the decision in *The Genesee Chief*, *supra*, were filed between 1850 and 1875, after the Webster Ashburton Treaty was signed and approved by Great Britain and the United States. It was during this period that the rule of navigability quoted above was established in the United States Courts.

As the question of navigability came up in the courts of the different states, the rule was further extended. Some courts have taken as the test of legal navigability the capacity of the water to afford a passage for sea vessels. In other jurisdictions, a river is navigable if it is capable of floating rafts as distinguished from single logs. And in many of the states, streams which are merely floatable and useful for logging purposes, are navigable so far as the public use is concerned.

45 *Corpus Juris* 101 111.

The latter rule is the rule which has been adopted in Minnesota as well as in other states in which the timber industry was carried on.

"The public have a right of way in every stream which, in its natural state and ordinary volume, is capable of transporting to market the products of the forest or mines or of the soil along its banks. It is not essential that the property to be transported shall be carried in vessels or be guided by the hand of man. Nor is it necessary that the stream shall be capable of navigation against the current, or that it shall be navigable

at all seasons of the year. It is sufficient, if, from natural causes, it is navigable at certain seasons."

Minnesota Canal and Power Company vs. Koochiching Company, 97 Minn. 429, 107 N. W. 405.

But the intention of the parties to the Webster Ashburton Treaty cannot be determined by applying the modern rule of navigability as the same is now stated by the United States Courts or by the Supreme Court of Minnesota, because these rules of navigability had not been established when the Webster Ashburton Treaty was written, and, as stated above, the rule in this Court then depended upon the ebb and flow of the tide. In extending the rule from tidal waters, this Court may very well have adopted the rule which is in force in Minnesota and a number of the other timber states. But the intention of the parties to the treaty must be determined as of the time the treaty was written.

The appellee contends that navigability is not a controlling factor or of any particular importance in this litigation. If a border water is in fact navigable it is by the law of nations and without a treaty provision "free and open to the citizens and subjects" of the countries on either side of the river (*The Fame*, Fed. case No. 4634). We may concede that a non navigable border stream is not free and open, without a treaty provision to that effect. But it is clear, that, regardless of navigability, the Pigeon River was one of the "water communications" between Lake Superior and Lake of the Woods and by the terms of the Webster Ashburton Treaty is free and open to the use of the citizens and subjects of both countries.

Suppose we assume that the Pigeon River is not a navigable stream and apply the law relating to non-navigable streams and try and determine the rights of the riparian

proprietors and the jurisdiction of the Governments on either side of the stream. It is fundamental, of course, that the State of Minnesota has no jurisdiction beyond the center of the stream. The riparian proprietors on the Minnesota side would have title to the shore and bed of the stream to the imaginary boundary line and the State of Minnesota would have jurisdiction to the center of the stream. The Canadian Government and the people of Canada would own to the center of the stream and have the same rights on the Canadian side. We would have riparian proprietors on opposite sides of the stream with an international boundary as a dividing line. Even if the stream were not an international highway, the riparian owners would be obliged to use or control the running water in such a manner as not to infringe upon or prejudice the rights of other riparian proprietors to the use of the stream.

> "No proprietor has the right to use the water to the prejudice of other proprietors above, or below, or opposite, unless he has a prior right of diversion or a title to an exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua Currit et debet currere ut currere solebat* is the maxim. He must not unreasonably detain it or give it another direction, and must return it to the original channel when it leaves his estate. By virtue of his ownership of the banks and the land in front thereof to the middle of the stream, each riparian proprietor has a right to the use of the water flowing in its natural channel, without diminution or obstruction, and no proprietor has the right to diminish the quantity which will flow, according to the natural current, to a proprietor below."
>
> *Pinney vs. Luce*, 44 Minn. 367, 46 N. W. 561.

If this is the rule between owners of property on non-navigable water courses, by what authority can the State of Minnesota control the water in this border stream? Regardless of navigability, who owns the water in Pigeon River? Who has the right to control the flow of the water in Pigeon River? Who has authority to legislate regarding the use of this border stream?

In the case of *Stillman vs. White Rock Manufacturing Company*, Federal case No. 13446, the plaintiffs, citizens of Connecticut, asked for an injunction against diversion of water from the Pawtucket River which forms the dividing line between Connecticut and Rhode Island. The defendants had a dam in the river and had built a canal on the Rhode Island side where they owned a mill site. The plaintiffs owned a dam 250 feet down the river and the canal carried the water below plaintiffs' dam. The Court granted the injunction and in the opinion said:

> "It becomes necessary, therefore, to ascertain now, what is the interest, if any, which the complainants by owning land on the Connecticut side of the river are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy. After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described to an undivided half of the water on that side, as well as on the other side. A fence or improvement cannot be usually made in the middle of a large stream where the right to the soil terminates; and if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence it is reasonable to regard these interests in the whole stream to be an undivided half, or a tenancy in common, and if

either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere."

* * * * * * * * *

"The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream, and not entirely on or to the mill and land situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H. 259. The first and direct injury, then, is to the easement and consequent rights existing beyond the center."

If the Pigeon River is not a navigable stream, the State of Minnesota could not grant to the defendant the right to improve it or collect tolls thereon. In such a case the state might, in the exercise of the right of eminent domain, authorize a corporation to condemn the property, but the statute under which the defendant is organized does not grant such a right to the defendant and it was not the intention of the Legislature so to do. The defendant is not a riparian proprietor and is not exercising the usual rights of a riparian owner. And, even in its exercise of the power of eminent domain, the state could not authorize the taking of property beyond the international boundary nor could it exercise any control over the water in the stream, because this would belong to the owners on both sides of the international boundary line. The control of the water in the river on one side results in the taking of property on the other side. The usual powers of the state respecting navigable

waters within its borders do not extend to non navigable streams. The defendant therefore, has no right, under its charter as a boom company, to dam or improve or obstruct or collect tolls on the Pigeon River, if it is a non navigable stream.

In the Clark case the Circuit Court of Appeals said:

> "The Webster Ashburton Treaty was drawn by experts skilled in such affairs, who must be supposed to have known exactly what they were doing. If they were referring only to navigable water communications being kept free and open it would have been very easy to have so stated, but the treaty does not so state. Where it was considered important in the treaty to refer to navigable streams that course was followed. * * * As to the Pigeon River it was not said that navigation should be free and open but that 'all water communications' shall be 'free and open.' * * * If Daniel Webster and Lord Ashburton had intended to confine the clause in question here to navigable waters they would have used such term. It is significant that they did not do so. Why should the Court write into their language something they evidently intentionally omitted?"

We respectfully submit that, regardless of navigability, the Pigeon River was made an international highway by the terms of the Webster-Ashburton Treaty and that navigability is not of any particular importance in this litigation.

ACT OF CONGRESS.

The appellant now relies upon an Act of Congress (31 U. S. Stat. 1455, Chap. 878) and claims that by this act it was authorized to improve Pigeon River and collect tolls on appellee's pulpwood.

This Act of Congress merely gives to appellant the right "to enter upon Grand Portage Indian Reservation and improve Pigeon River at what is known as the cascades of said river, for the purpose of making such river *at said point* navigable for floating logs." It seems clear that "cascades" refers to the one point in the river referred to by that name.

Any improvement under this act was to be made "under such rules and regulations and *subject* to such conditions and limitations as the Secretary of the Interior may prescribe." These rules and regulations and conditions and limitations were conditions precedent to the improvement of the river. There is nothing in the amended complaint to indicate that any rules or regulations were prescribed by the Secretary of the Interior or that the improvement authorized to be made under such rules and regulations was in fact made.

We recognize the rule stated by this Court to the effect that an Act of Congress is of equal rank with a treaty provision but "an intention to alter and *pro tanto* abrogate a treaty is not to be likely attributed to Congress" (*U. S. vs. Payne*, 246 U. S. 446).

The Court will take judicial notice of an Act of Congress but one who seeks the benefit of a statute must, *by averment and proof*, bring himself within its provisions.

People vs. Jackson, 24 Cal. 631.

Burrell vs. Howe, 40 Cal. 373.

Rohda vs. Alameda County, 52 Cal. 350.

McCullough vs. Colfax County, 95 N. W. (Neb.) 29.

Hatch vs. Peel, 23 Barb. (N. Y.) 575.

Moore vs. Hammond, 121 Fed. 759; Certiorari denied, 191 U. S. 569.

Byron vs. Board of Water Commissioners, 41 Minn. 519, 43 N. W. 482.

21 *R. C. L.* 444.

12 *C. J.* 407, Note 17 (8).

40 *C. J.* 58.

In its amended complaint the plaintiff alleged that it is a corporation organized under the laws of the State of Minnesota and "*as such* was at all times and is empowered to construct, maintain, operate and manage dams, sluices, flumes, slides, locks, reservoirs, bulkheads, booms and other structures useful or expedient in properly improving, developing and using the water supply for the purpose of handling, floating or navigating logs, ties, poles, posts, timber and wood of every description upon, over and in that part of the stream commonly known as Pigeon River, bordering or lying within the boundaries of Cook County, Minnesota, and its tributaries, as well as clearing, straightening and improving the channel of said stream, and to charge, receive and collect tolls and compensation for the use of said improvements and property in running, driving and handling said timber products, and to contract with other companies for the improvement, maintenance, operation and use of such other improvements upon Pigeon River and its tributaries in Canada, as may be expedient, and to do all acts and transact all business authorized by law connected with or incidental to the construction, ownership, maintenance

and operation of an improvement, slide and boom company, and the properties connected therewith."

In appellant's assignments of error (Transcript of Record, pages 45-47), the appellant assigns as error the decision of the Circuit Court of Appeals in holding that the Minnesota law under which it is organized is repugnant to the Constitution of the United States and the Webster Ashburton Treaty; in holding that Section 8 of Article I of the Constitution of the United States prevents appellant from collecting tolls pursuant to permission conferred by appellant's charter from the State of Minnesota; in holding that the Webster Ashburton Treaty prevents appellant from collecting tolls pursuant to the Minnesota law; and in holding that the movement of timber on Pigeon River is foreign commerce over which the State of Minnesota cannot exercise control to the extent of chartering appellant to improve the river and collect tolls thereon.

No reference is made, either in the amended complaint or in the assignments of error to the Act of Congress (31 U. S. Stat. 1455, Chapter 878) or to any authority from the Federal Government.

It is apparent that the Act of Congress now relied upon gave appellant no such powers or rights as are alleged in the amended complaint.

The title of this Act of Congress is as follows: "An Act to authorize Pigeon River Improvement, Slide and Boom Company of Minnesota to enter upon the Grand Portage Indian Reservation, and improve the Pigeon River in said state at what is known as the cascades of said river." In the body of the act, the appellant is authorized "to enter upon the unallotted lands and with the consent of the allottees upon any allotted lands," adjacent to the cascades, of the Grand Portage Indian Reservation. The appellant was also

authorized to take timber from the unallotted lands at a price to be agreed upon with the Secretary of the Interior.

The entry upon the reservation seems to be the important thing covered by the act. The act was considered necessary only because of the existence of the reservation adjacent to a portion of the river. It was so presented to Congress (Congressional Record, 56th Congress, 2nd Session, page 3162). Perhaps, the appellant, at the time, was relying upon its Minnesota charter for authority to improve the river and collect tolls but had an idea that title to the bed of the stream was in the riparian owners. It would have to have authority from Congress to enter the reservation and cut timber. If the bed of the stream were owned by riparian owners, it would have to have the consent of Congress to improve the point on the river known as the cascades because the reservation is adjacent to this point.

It may be that this act would, under rules and regulations prescribed by the Secretary of the Interior, authorize appellant to enter the reservation and cut timber and grant to appellant whatever permission would ordinarily be required from a riparian owner, to enter upon and improve the river at the point known as the cascades which adjoins the reservation. But it can hardly be said that a bill written in this form and presented in the manner stated, was intended to alter and abrogate a treaty of the United States.

In its amended complaint and in its assignments of error, plaintiff based its claim to tolls upon the authority which the State of Minnesota attempted to grant to it. The appellant, Pigeon River Improvement, Slide & Boom Company, was named in this Act of Congress. If the appellant had relied upon authority granted by the Act of Congress and had improved Pigeon River under rules and regulations prescribed by the Secretary of the Interior, the officers of the plaintiff

company would surely have known something about it. It would not have been possible for the plaintiff to permit this litigation to go through the District and Circuit Courts without calling such authority to the attention of the Court. The fact is that the appellant did not rely upon authority granted to it by the United States under this Act of Congress or otherwise. It based its claim to tolls upon the authority which the State of Minnesota attempted to grant to it. But it appears now that the state could grant no authority for the improvement of an international highway or for the collection of tolls on Canadian pulpwood floating down a boundary water. And, we respectfully submit, the Federal Government has granted no such authority. And we further submit, that, before appellant could become vested with any rights or authority on the Pigeon River under the act referred to, it would have to make the improvement authorized by Congress under such rules and regulations and subject to such conditions and limitations as the Secretary of the Interior may prescribe. In order to state a cause of action, it would have to plead that these conditions precedent had been performed. The amended complaint does not allege that any such rules or regulations were prescribed or that any improvement was made thereunder, consequently, the appellant cannot now rely upon this Act of Congress.

ACT OF CONGRESS RELATING TO IMPROVEMENT OF WATERS OF THE UNITED STATES.

An Act of Congress approved March 3rd, 1899 (30 U. S. Stat. 1151) provides:

> "It shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, road-

stead, haven, harbor, canal, navigable river, or other waters of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War."

We respectfully submit that any water which by the terms of a treaty is made the boundary between the United States and a foreign country and which is free and open to the citizens of both countries and which has been made a highway for foreign commerce, is included in the waters described in the Act of Congress just above quoted.

CONCLUSION.

We respectfully submit:

First: That, under the Webster-Ashburton Treaty, the Pigeon River, from main shore to main shore, is and always has been a boundary water.

Second: That the Pigeon River, from its mouth, is one of the "water communications" referred to in the Webster-Ashburton Treaty.

Third: That the movement of Canadian pulpwood on the Pigeon River is foreign commerce.

Fourth: That the collection of tolls on Canadian pulpwood floating down the Pigeon River is a violation of the Webster-Ashburton Treaty.

Fifth: That the State of Minnesota had no authority to grant to appellant the right to improve Pigeon River or to collect tolls thereon.

Sixth: That the United States has not granted to appellant the right to collect tolls on Canadian pulpwood floating

down the Pigeon River on its way to Lake Superior and Canadian mills and particularly not on pulpwood which floats into Pigeon River below the cascades.

Seventh: That the improvement of Pigeon River under rules and regulations and subject to such conditions and limitations as the Secretary of the Interior may prescribe was a condition precedent to the vesting of any rights in the appellant under the Act of Congress (31 U. S. Stat. 1455, Chap. 878) and to state a cause of action plaintiff would have to plead that these conditions had been performed.

Eighth: That navigability is not a controlling factor nor of any particular importance in this litigation.

Ninth: That the Root-Bryce Treaty does not repeal the Webster-Ashburton Treaty.

Tenth: That the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 126.—October Term, 1933.

Pigeon River Improvement, Slide & Boom Company, Appellant, *vs.* Charles W. Cox, Limited.	Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[January 15, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Pigeon River Improvement, Slide & Boom Company, a Minnesota corporation, brought this action against Charles W. Cox, Limited, a Canadian corporation, to recover tolls for the use of improvements which the Minnesota corporation had made in the Pigeon River. These improvements embraced sluiceways, booms and dams, which were used by the defendant in driving, sluicing and floating timber products. The case was removed to the Federal court, a demurrer to the amended complaint was sustained without leave further to amend, and the judgment of dismissal was affirmed by the Circuit Court of Appeals. 63 F. (2d) 567. The case comes here on appeal.

Pigeon River is a boundary stream between the State of Minnesota and the Province of Ontario, Dominion of Canada, at the northeast corner of Minnesota. The river is a small stream which has its source in lakes on the international boundary and flows in a southeasterly direction along that boundary for about forty miles, discharging at Pigeon Bay into Lake Superior. The boundary is approximately midstream. The defense against the charge of tolls is based upon Article II of the Treaty of 1842—the Webster-Ashburton Treaty—which, after defining the international boundary, provides as follows:[1]

"It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of

[1] 8 Stat. 574; Malloy, Treaties, vol. 1, pp. 652, 653.

Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries".

When this treaty was concluded, the lower portion of the Pigeon River was impassable because of falls and rapids. On July 25, 1842, Mr. Ferguson, who had been surveyor to the commissioners under the seventh article of the Treaty of Ghent,[2] thus described this part of the river in response to an inquiry by Mr. Webster:[3] "At the mouth of the Pigeon River, there is probably about three hundred yards in length of alluvial formation; but the river above that, as far as to near Fort Charlotte, runs between steep cut rocks of basaltic or primitive formation, and is a succession of falls and rapids for nearly its whole length—the last cataract, which is within about a mile of its mouth, being almost one hundred feet in height". Below Fort Charlotte on the Pigeon River, communication with Lake Superior was by means of a trail about nine miles long running south of the river, and some distance from it, which was known as the Grand Portage and was so described in the treaty.[4] In Mr. Webster's communication to Lord Ashburton of July 27, 1842, summarizing the understanding which had been reached as to the boundary and setting forth the proposed stipulation as to water communications and portages which was incorporated in the treaty as above quoted, he said: "The broken and difficult nature of the water communication from Lake Superior

[2] 8 Stat. 221, 222; Malloy, Treaties, *loc. cit.*, pp. 617, 624.

[3] Sen. Doc., vol. 1, No. 1, 27th Cong., 3d sess., pp. 104, 105. See also "The Topography and Geology of the Grand Portage", George M. Schwartz, Minnesota Historical Bulletin, vol. 9, p. 27.

[4] "The Pigeon River, which now forms the international boundary at Lake Superior, was, in the days of water transportation, the best natural highway between the Great Lakes or the St. Lawrence system, and the great northwestern section of the continent, with its thousands of lakes and streams draining into Hudson Bay or the Arctic Ocean. But the Pigeon River, through the last twenty miles of its course before it flows into Lake Superior, is so obstructed by falls and by cascades in rocky canyons as to be impossible of navigation. On the Canadian side the land is too mountainous and the distance too great for portaging to be practicable; but on the American side the line of the lake shore is roughly parallel to the river, and about seven or eight miles from the mouth of the river a little bay forms a natural harbor from which a portage of about nine miles over not too difficult country can be made to the Pigeon River above the cascades". "The Story of the Grand Portage", Solon J. Buck, Minnesota History Bulletin, vol. 5, p. 14.

to the Lake of the Woods renders numerous portages necessary; and it is right that these water communications and these portages should make a common highway where necessary for the use of the subjects and citizens of both Governments".[5] At the time of the conclusion of the treaty, this was the highway of commerce, used principally by fur traders, between the Great Lakes and the country to the north and northwest.[6] But the Pigeon River itself prior to the improvements here in question, as alleged in the complaint and admitted by the demurrer, "was at all times incapable of use for the driving, handling and floating of logs, pulp-wood and timber".

Pigeon River Improvement, Slide & Boom Company, which for convenience we may call the Pigeon River Company, was incorporated in 1898 under the General Laws of Minnesota.[7] These laws purported to empower the Pigeon River Company to improve streams by erecting sluiceways, booms, dams and other works; to acquire structures already erected together with necessary rights of way, shore rights, land and lands under water; to operate its works so as to render the driving of logs practicable; and to collect "reasonable and uniform tolls upon all logs, lumber and timber driven, sluiced or floated" on the streams so improved. The Company was also authorized, in the case of a boundary stream, to purchase stock in a corporation created in an adjoining State or country for similar purposes upon the same stream, or to unite with such a corporation, upon conditions stated. Acting under this authority, the Pigeon River Company took possession of the portion of Pigeon River within the State of Minnesota and improved it by erecting sluiceways, booms and dams on the Minnesota side of the international boundary.

At the same time, the complaint alleges, the Arrow River & Tributaries, Boom & Slide Company, was organized under the

[5]Sen. Doc., vol. 1, No. 1, 27th Cong., 3rd sess., p. 61.

[6]For a description of the traffic carried on by means of the Grand Portage, see "The Story of the Grand Portage", Minnesota History Bulletin, vol. 5, pp. 15-26; "Voyages from Montreal through the Continent of North America", Sir Alexander Mackenzie, vol. 1, pp. lxxi, lxxvii-lxxxii; Henry-Thompson Journals, Elliott Coues, vol. 1, pp. 6, 7; Wisconsin Historical Collections, vol. xi, pp. 123-125, note.

[7]General Laws of Minnesota, 1878, Chap. 34; 1889, Chap. 221; 1905, Chap. 89; Mason's Minnesota Statutes, 1927, secs. 7550-7552.

laws of the Dominion of Canada and Province of Ontario with powers and purposes similar to those of the Pigeon River Company, but limited to the portion of the Pigeon River and its tributaries within the Dominion of Canada. This Canadian corporation, under an agreement with the Pigeon River Company, similarly improved the portion of the Pigeon River on the Dominion side of the boundary, so that the improvements made by each company "constituted complements the one of the other, and the whole of said improvements rendered the driving of logs thereon reasonably practicable and certain." These improvements, which have since been maintained, were all located below Fort Charlotte on the Pigeon River, with the sole exception of a reservoir dam at the south end of South Fowl Lake.

Adjacent to the lower part of the Pigeon River on the Minnesota side lies the Grand Portage Indian Reservation, extending for a considerable distance along the stream.[8] By the Act of Congress of March 3, 1901,[9] the Pigeon River Company was authorized, under such regulations and conditions as the Secretary of the Interior might prescribe, to "improve the Pigeon River at what is known as the cascades of said river, for the purpose of making said river at said point navigable for floating logs." For that purpose the Company was empowered to enter upon unallotted lands and, with the consent of the allottees, upon allotted lands, adjacent to the cascades, of the Grand Portage Indian Reservation and to construct such dams, bulkheads and other works as should be necessary. It was further provided that the river "after being so improved shall be open at all times to the free passage of all timber cut from said Grand Portage Indian Reservation, and to the passage of all other timber for a reasonable charge therefor".[10] It does not appear that the Secretary of the Interior prescribed any regulations or conditions in relation to the improvements made by the Pigeon River Company.

Recovery is now sought for the use by the defendant, a Canadian corporation, of these improvements in the years 1928, 1929, and 1930, in driving, sluicing and floating upon the Pigeon River its

[8] 10 Stat. 1110; see, also, H. R. 51st Cong., 1st sess., Ex. Doc. No. 247, p. 59. 87, 878, 31 Stat. 1455.

[10] See Cong. Rec., 56th Cong., 2d sess., vol. 34, pt. 4, p. 3462.

pulp wood and railway ties. This timber, the defendant says in its argument, was cut from Canadian lands and put into the Arrow River, a tributary in Canada of the Pigeon River, and was floated into the Pigeon River on its way to Lake Superior and Canadian mills. The tolls charged the defendant are alleged in the complaint, and thus admitted, to be the "reasonable and uniform tolls" which the Pigeon River Company had established. No question is raised as to reasonableness or discrimination, the only question being whether in the light of the provision of the treaty any tolls whatever could be charged. The contentions of the defendant are that the Pigeon River is a boundary stream and, as one of the "water communications" described in the treaty, must be kept "free and open" to the use of the citizens and subjects of both countries; that the imposition of tolls is inconsistent with this stipulated immunity and is not justified by the legislation which the Pigeon River Company invokes.

The Circuit Court of Appeals in the instant case followed its earlier decision in *Clark* v. *Pigeon River Improvement, Slide & Boom Company*, 52 F. (2d) 550, where the court reached the conclusion that the charge of tolls was forbidden by the treaty. The court disagreed with the view advanced by the Pigeon River Company that the words of the treaty "as now actually used" limited the provision as to "free and open" use, expressing the opinion that these qualifying words referred only to the Grand Portage. *Id.*, pp. 555, 556. In support of its conclusion, the Circuit Court of Appeals cited the decision of the Appellate Division of the Supreme Court of Ontario in the case of *Arrow River & Tributaries, Slide & Boom Company, Ltd.*, 66 Ont. L. R. 577; where the court held that the Canadian Company did not have "the right to build upon the bed of the Pigeon River anything which may interfere with the enjoyment of free and open use of it by the citizens of the United States". After the Circuit Court of Appeals had decided the *Clark* case, the judgment in the case of the *Arrow River Company* was reversed by the Supreme Court of Canada. 1932 Canadian Supreme Court Reports, 495. The latter decision was brought to the attention of the Circuit Court of Appeals in the instant case but the court adhered to its former opinion. 63 F. (2d) pp. 568, 569.

The litigation in Canada presented the question whether the statutes of the Province of Ontario authorized the Canadian Com-

pany to construct and maintain works upon the Pigeon River on the Ontario side of the international boundary and to charge tolls upon timber passing through those works. It appeared that the Arrow River & Tributaries, Slide & Boom Company, Ltd., had been incorporated in 1922 under the Ontario "Companies Act,"[1] for the purpose of acquiring or constructing dams, booms and other works to facilitate the transmission of timber down the Arrow River, and its tributaries, and that part of the Pigeon River which is within the Province of Ontario; and that the Company had acquired title to, and had extended, works which had been erected by a former corporation formed in 1899 with the same shareholders and directors and with similar objects. The Company applied to the District Judge for approval of tolls to be charged for the use of these works, and the respondent in that case, the Pigeon River Timber Company, Ltd., sought an injunction restraining the District Judge from acting upon the application. The Webster-Ashburton Treaty was invoked and it was contended that the provision of the Ontario statute, so far as it purported to authorize the Company to charge tolls for the use of its improvements on that river, was "*ultra vires* of the Ontario Legislature". The District Judge refused the injunction for the reason that "treaties to which Great Britain is a party are not as such binding on the individual subject in the absence of legislation." On appeal, the Appellate Division of the Supreme Court of Ontario agreed with that principle but had a different opinion as to the effect of the legislation of Ontario. That Court decided that the statute in question applied to lakes and rivers that were wholly within the Province and did not apply to the Pigeon River which was a boundary stream. The reason given for this construction was that the court should not impute to the legislature an intent to authorize a violation of the terms of the treaty, if the statutory provision was capable of another construction. The Supreme Court of Canada reversed this decision of the Appellate Division of the Supreme Court of Ontario, holding that the statute did authorize the construction of the works on the Pigeon River and also the charge of tolls for the use of the improvements, and, as thus construed, was within the competency of the provincial legislature.

[1]R. S. O. 1914, c. 178; R. S. O. 1927, c. 218; Lakes and Rivers Improvement Act, R. S. O. 1927, c. 43, secs. 32, 52.

In the Supreme Court of Canada three opinions were delivered. Three of the five judges held that the legislation was not in conflict with the terms of the treaty. Of this majority, Judges Rinfret and Smith, in an opinion delivered by the latter, took the view that the right preserved by the provision of the treaty "was the right to continue to use the water communication and portages then in use". They expressly disagreed with the opinion of the Circuit Court of Appeals in the *Clark* case, *supra*, that the words "as now actually used" applied only to Grand Portage. These judges could not see any reason "for preserving a right to use Grand Portage that would not apply to other portages", and they thought that the language of the provision appeared "to apply to all, and to the water communications, and should be so construed". They added: "What was being dealt with, and what was in the contemplation of the parties, was travel and transportation over the water communications and portages as then used, and there was . . . no thought or intention of dealing with the use of these non-navigable rapids and falls that were not in use and could not be used, the passing of which was provided for by the portages".

Chief Justice Anglin wrote a separate opinion agreeing in the result "largely for the reasons" stated by Judges Rinfret and Smith. He said, however, that he should have "preferred it had the majority of the court seen its way clear to base its decision upon a holding" that the stipulation of the treaty "was merely meant to ensure to the citizens of both countries equality of rights in regard to the water communications, portages, etc., and that it never was intended thereby to provide that in no event should either party to the treaty be at liberty, as regards citizens of its own nationality, to impose tolls for the use of improvements lawfully to be made thereon"; that "where either party to the treaty saw fit to impose tolls upon its own citizens, in regard to such improvements, it should be at liberty to impose like tolls (but none greater) on citizens of the other country for the use of the improvements so made".

Two judges—Judges Lamont and Cannon—delivered an opinion to the effect that "although at the date of the treaty the chief purpose for which these water communications were being used was the transportation by boat or canoe of persons and goods, the

clause in question places no limit on the purposes for which they might be used"; that "they are to be 'free and open' to the people of both countries for whatever purpose they may desire to use them as a water communication", and therefore if "they could be used for any purpose which did not necessitate the making of a portage to get past a point of danger", there was "nothing in the clause, or in any other part of the treaty, which would compel the use of the portage in order to have a free passage". These judges thought that to hold otherwise would be "to give too narrow a construction to the language used, and to impute a want of vision to the framers of the treaty". They expressed the opinion that the Pigeon River "from its mouth along both sides of the boundary line, forms part of the 'water communications' which were to be free and open", and that this provision is not consistent with the imposition of tolls for the use of improvements erected in the river. While thus construing the treaty, Judges Lamont and Cannon nevertheless reached the final conclusion that the legislation authorizing the imposition of tolls was applicable and valid. This was in the view that "the legislative competence of a provincial legislature is as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed, and could bestow"; that the existence of the treaty does not of itself impose a limitation upon the provincial legislative power; that "the treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power". Hence, it was said, the rights and privileges given by a treaty are, under Canadian law, enforceable by the courts only where the treaty "has been implemented or sanctioned by legislation rendering it binding upon the subject", and the statute giving authority to impose tolls for the use of the improvements "must be considered to be a valid enactment until the treaty is implemented by Imperial or Dominion legislation". While the judges of the Supreme Court of Canada thus differed in the grounds of their judgments, they agreed in the result.

Under this decision in Canada and that of the Circuit Court of Appeals, we have the extraordinary situation that as to these improvements at the same place on the boundary stream—improvements necessarily complementary to each other—the Ontario Com-

pany may impose charges upon citizens of the United States for the use of its works on the Canadian side of the line while the Minnesota Company may not charge citizens of Canada for the use of its corresponding works on the Minnesota side.

In deciding the instant case, we think that there are controlling considerations which make it unnecessary to pass broadly upon the significance of the words "free and open" in provisions in treaties relating to the use of navigable streams,—a phrase which with different contexts has been repeatedly used in international engagements.[12] The question here is simply as to the application of these words of the Webster-Ashburton Treaty to this particular boundary stream, the Pigeon River, at points where the river was impassable and hence not used as a means of communication at the time the treaty was made, the travel and transportation of that period, and of earlier times, necessarily seeking the portage by means of which alone it was practicable to secure the desired communication. The words of the clause in question "as then actually used", undoubtedly refer to the Grand Portage but we think there is force in the reasoning of the opinion of Judges Rinfret and Smith in the Supreme Court of Canada that these words were not limited to that portage, and we are not convinced that it was the intention either to preclude an improvement which would make a stream along the boundary available for use theretofore impossible, or to prevent a reasonable and non-discriminatory charge for the use of such an improvement. In the terms of the treaty we find no compelling clarity of prohibition. At best, the clause is ambiguous, and it is appropriate that we should look to the practical construction which has been placed upon it.

With respect to the portion of the stream within the territorial jurisdiction of the State of Minnesota, the legislature of that State authorized the erection of these improvements and the charg-

[12]See Treaty of September 3, 1783, between the United States and Great Britain, Art. VIII, Malloy, p. 589; Webster-Ashburton Treaty, 1842, Art. III, Malloy, p. 653; Treaty of Washington, 1871, Arts. XXVI, XXVIII, compare Art. XXVII, Malloy, p. 711; Convention concerning the Boundary Waters between the United States and Canada, 1909, Art. I, U. S. Treaties, vol. 3, p. 2608; Treaty of Guadalupe Hidalgo, 1848, Arts. VI, VII, Gadsden Treaty, 1853, Art. IV, Malloy, pp. 1111, 1123; Moore, International Law Digest, vol. 1, pp. 625, *et seq.*; Hyde, International Law, vol. 1, secs. 160, *et seq.*; Oppenheim, International Law, 4th ed., secs. 178, *et seq.*

ing of reasonable tolls. In contemplation of improvements of this sort in a stream forming part of the international boundary, the state legislation expressly provided for the [illegible] of such an enterprise with a similar and complementary project appropriately authorized with respect to the Canadian portion of the stream. In the absence of a violation of treaty, or of conflict with an act of the Congress, there can be no doubt as to the power of the State to establish such an aid to commerce. An undertaking of this character by the State falls within the familiar category of cases in which a State may make reasonable provision for local improvements until its authority is superseded by dominant Federal action.[13] The fact that the stream forms part of the international boundary does not make this principle inapplicable. Where, under section 9 of the Act of March 3, 1899,[14] the consent of Congress is required for the erection of structures in or over navigable waters not lying wholly within a State, "the act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State"; it merely subjects the exercise of the right "to the further condition of getting from Congress consent to action upon the grant". *International Bridge Co.* v. *New York*, 254 U. S. 126, 133.

It is not necessary to decide whether, in view of the impassable condition of the portion of the Pigeon River under consideration, the improvements came under the provisions of either Section 9 or Section 10 of the Act of March 3, 1899,[15] as we are of the opinion that the improvements were made with the consent of Congress. By the Act of March 3, 1901[16] (which apparently was not brought

[13] Willson v. Blackbird Creek Marsh Co., 2 Pet. 245; Gilman v. Philadelphia, 3 Wall. 713; Pound v. Turck, 95 U. S. 459; County of Mobile v. Kimball, 102 U. S. 691; Cardwell v. American Bridge Co., 113 U. S. 205; Huse v. Glover, 119 U. S. 543; Sands v. Manistee River Improvement Co., 123 U. S. 288; Lindsay & Phelps Co. v. Mullen, 176 U. S. 126; Minnesota Rate Cases, 230 U. S. 352, 403-405; International Bridge Co. v. New York, 254 U. S. 126; Economy Light & Power Co. v. United States, 256 U. S. 113; Newark v. Central Railroad Co., 267 U. S. 377.

[14] 30 Stat. 1151.

[15] See United States v. Rio Grande Irrigation Co., 174 U. S. 690, 707, 708; Leovy v. United States, 177 U. S. 621, 628; Economy Light & Power Co. v. United States, 256 U. S. 113, 123, 124; Wisconsin v. Illinois, 278 U. S. 367, 412, 413.

[16] See Note 9.

to the attention of the Circuit Court of Appeals), the Congress expressly authorized the Pigeon River Company to improve the river in order that it might be rendered navigable for floating logs, to erect dams and other works necessary for that purpose, and to impose a reasonable charge for the passage of all timber save that which was cut from the adjoining Grand Portage Indian Reservation. The fact that this authority directly applied to that part of the Pigeon River known as "the cascades" does not, in our judgment, detract from the significance of the Act as showing the acquiescence of the Congress in the improvements here in question. The authority was given because of the governmental interest in the Indian Reservation adjacent to the Pigeon River, and it is obvious that the works at the cascades would have been futile if the related portions of the river required for the contemplated flotation of timber were not appropriately improved. The consent of the Congress, running expressly to the Pigeon River Company as a corporation organized under the applicable laws of Minnesota, for the erection of the structures at the cascades where the interests of the Indian Reservation were involved, necessarily implied acquiescence in the action by the State in authorizing the improvements which would accomplish the purpose which the Congress had in view. Nor does it affect the question that the congressional authorization was stated to be subject to such regulations and conditions as the Secretary of the Interior might prescribe. It is not shown that the Secretary has imposed restrictions and the Act did not require him to impose them.

We find no reason for regarding this action as intended to abrogate or modify the provision of the Webster-Ashburton Treaty. So far as the Act of Congress specifically authorized the charging of tolls for the use of the improvements on the Minnesota side of the boundary, it would control in our courts as the later expression of our municipal law, even though it conflicted with the provision of the treaty and the international obligation remained unaffected. *The Cherokee Tobacco,* 11 Wall. 616, 621; *Head Money Cases,* 112 U. S. 580, 597; *Cook* v. *United States,* 288 U. S. 102, 120. But the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. *Chew Heong* v. *United States,* 112 U. S. 536, 549; *United States* v. *Payne,* 264 U. S. 446, 449; *Cook* v. *United States, supra.* We think that it is proper to infer that the

Congress, in view of the condition of the stream and the purpose of the improvements, did not consider the authority to make them and to impose a reasonable charge for their use, as being inconsistent with the treaty stipulation. We regard the action of the Congress, following that of the State, as a practical construction of the treaty as permitting these works and justifying the charge.

The same may be said of the action of the Province of Ontario in providing for the complementary works on the Canadian side of the boundary and authorizing tolls for their use. While this action was taken in the plenitude of the power of the provincial legislature as defined by the Supreme Court of Canada, we perceive no reason for ascribing to that legislature an intention to override the provision of the treaty but rather see in that action an assumption on the part of the legislature that its course was not repugnant to the treaty, an inference which finds abundant support in the conclusion of the majority of the judges of the Supreme Court of Canada. Nor does it appear that either of the Parties to the treaty has made to the other any representations as to a breach of obligation by reason of the making of the improvements or the imposition of tolls. We find no ground for rejecting the practical construction which the treaty has thus received.

Further, in 1909, for the purpose of settling all questions pending between the United States and the Dominion of Canada, "involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along their common frontier", the United States and Great Britain entered into a treaty concerning the boundary waters.[17] By Article I of this treaty the Parties formulated their agreement "that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to ships, vessels and boats of both countries equally".[18] The treaty expressly refers to uses and obstructions of boundary waters which had theretofore been permitted and sets up an Inter-

[17] 36 Stat. 2448, U. S. Treaties, vol. 3, p. 2607.

[18] Article I of the Treaty of 1909 is as follows:

"The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country,

national Joint Commission with jurisdiction to deal with future uses and obstructions, as stated. Article III of the treaty thus provides: "It is agreed that in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission to be known as the International Joint Commission".

We think it may fairly be said that the improvements here in question on the Pigeon River constituted structures and uses which had been permitted by the Parties prior to the treaty of 1909 and were recognized by that treaty. It does not appear that any action has been taken by either Government or by the International Joint Commission inconsistent with this view.

We conclude that it was error to sustain the demurrer to the amended complaint. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

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within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

"It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof".